NO. 11092

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MAUDE ANDERSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
FIRST JUDICIAL DIVISION

Appellant's Opening Brief

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INDEX

Statutes

DECISIONS

Encyclopedias

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ON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
DIVISION NO. 1.

BRIEF OF APPELLANT

This is an appeal by the appellant, who was the defendant below, from a judgment of the District Court for the First Judicial Division of the Territory of Alaska sentencing her to serve a term of three years in the Federal penitentiary and to pay a fine of $2,500 upon her conviction of the crime of violating the White Slave Traffic Act. (See: infra p. 104).

STATEMENT OF BASIS OF JURISDICTION

1. The Circuit Court of Appeals has jurisdiction to review the final judgment in this cause upon appeal. Sec. 225, Title 28, U.S.C.A., Judicial Code, Sec. 128, as amended, provides:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions . . . .
>
> "Third. In the District Court for the District of Alaska, or any division thereof, and in the District Court of the Virgin Islands, in all cases; and in the United States District Court for the District of the Canal Zone in the cases and modes prescribed in sections 61 and 62, title 7, Canal Zone Code (48 Stat. 1122)."

2. The District Court for the Territory of Alaska had jurisdiction in the first instance.

GENERAL JURISDICTION OF DISTRICT COURT

> "District Court established; judges; divisions; their boundaries. There is established a District Court for the Territory of Alaska, with the jurisdiction of district courts of the United States, and with the general jurisdiction in civil, criminal, equity and admiralty causes . . . . . " 48 USCA No. 101; Sec. 1091, CLA 1933.

STATEMENT OF THE CASE

The appellant, Maude Anderson, hereinafter called the defendant, was convicted of violating the White Slave Traffic Act (Act June 25, 1910, c. 395, Sec. 2, 36 Stat. 825; 18 USCA 398) in the District Court for the Territory of Alaska, First Judicial Division, at Juneau, on April 7, 1945.

THE INDICTMENT

The Indictment charged "that Maude Anderson on or about the 25th of November, 1941, at Sitka, in Division Number One, Territory of Alaska, and within the jurisdiction of said Court, did, wilfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, a woman for the purpose of prostitution and for immoral purposes, to-wit: Gloria Virginia Knapp Bowman, alias Jean LaRue, from Seattle, in the State of Washington, to Sitka, in the Territory of Alaska, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States and the Territory of Alaska." (Tr. 2, 3).

JUDGMENT AND COMMITMENT

On May 4, 1945, the District Court adjudged "that it is the judgment of the Court that the defendant, Maude Anderson, is guilty of the crime of Knowingly Causing and Aiding Transportation of a Woman in Interstate Commerce for Purpose of Prostitution, in violation of Title 18, U.S.C.A., Section 398, as charged in said Indictment, and it is the Sentence of the Court that the defendant be imprisoned in the Federal Penitentiary at McNeil Island, Washington, or in such other institution as the Attorney General of the United States may direct, for a period of Three (3) Years, and that the defendant pay to the United States of America a fine of Two Thousand Five Hundred Dollars ($2,500.00), that it have execution therefor, that the

defendant be committed to said Penitentiary until said fine is paid, and that said defendant stand committed until the sentence herein imposed is fully executed and paid." (Tr. 11, 12).

SPECIFICATION OF ERRORS

We believe, for purpose of argument, defendant's assignments can be logically classified under the points, namely:

(A) Evidence of transportation of other girls than one named in the indictment and of method of distribution of prostitution earnings was incompetent and prejudicial.

(B) Abuse of discretion in denying defendant's motion for continuance and in rejecting evidence offered by her to show prosecuting witness Miller motivated by spirit of revenge.

(C) Witness Bowman's testimony of agent Miller's acts and declarations, made and done beyond defendant's presence, could not prove existence of agency and were inadmissible.

(D) Accomplice Miller's testimony of contents of letter which she claimed defendant had written to her but which Miller had deliberately destroyed because she deemed it incriminatory was neither corroborative nor admissible.

(E) Telegram, Plaintiff's Exhibit 1, which accomplice Miller testified she sent to defendant, was admitted without proof of having been sent at defendant's request or direction and was not binding on defendant.

(F) Court refused defendant's request to charge on subject of credibility of accomplice Mil-

ler's testimony, as required by Section 4263, CLA 1933, and on subject of necessity of accomplice's testimony being corroborated by independent evidence, as required by Section 5352, CLA 1933, and yet its own instructions entirely ignored Section 4263, 4th Subdivision, and misstated and misconstrued requirements of Section 5352.

(G) Court refused defendant's request to charge, notwithstanding Court itself gave no charge on subject of necessity of proper proof of relationship of agent and principal between witness Miller and defendant.

(H) Court refused defendant's request to charge that no crime would be committed, but on the contrary charged that a crime would be committed by defendants' promise or agreement with Miller to pay or furnish the means of transportation of the girl to be transported even though defendant did not actually pay or furnish any such means of transportation.

(I) Court's instructions placed burden upon defendant to prove she was not an accomplice of witness Miller.

(J) Entire lack of independent evidence, as required by Section 5352, CLA 1933, to corroborate the accomplice Miller's testimony.

ARGUMENT

(A) Evidence of transportation of other girls than one named in the indictment and of method of distribution of prostitution earnings was incompetent and prejudicial.

Over defendant's objection that it was prejudicial to the defendant and that she was not accused by the

indictment of transporting or assisting to transport any one but Gloria Bowman, the Court permitted the accomplice Miller to testify that she had procured two more girls for defendant (Tr. 32 to 37), which objection is the basis of defendant's Assignment No. XI (Tr. 225 to 230), and also over defendant's objection that it was incompetent, irrevelant, immaterial and not binding upon defendant, permitted accomplice Miller to further testify as to the arrangements she made to transport these other two women (Tr. 62, 63), which objection is the basis of defendant's Assignment V (Tr. 236, 237).

The Court also, over defendant's objection, permitted the witness Cavender (Tr. 74) and the witness Gloria Bowman (Tr. 88) to both testify as to the financial arrangements or distribution of their earnings from prostitution, which objections are the basis of defendants' respective Assignments VII (Tr. 237, 238) and X (Tr. 240).

Certainly neither Miller's arranging to send two other prostitutes to Sitka nor the manner of distributing the prostitution earnings of either defendant Miller or of the witness Bowman proved the commission of the crime or defendant's connection therewith. The fact was not disputed that after the witness Bowman reached Sitka she did work as a prostitute in the defendant's house (Tr. 88).

We submit that this evidence was incompetent and its interjection into the suit could only and actually did greatly prejudice defendant.

(B) ABUSE OF DISCRETION IN DENYING DEFENDANT'S MOTION FOR CONTINUANCE AND IN REJECTING EVIDENCE OFFERED BY HER TO SHOW PROSECUTION WITNESS MILLER MOTIVATED BY SPIRIT OF REVENGE.

The trial Court refused to continue the trial over until the arrival of defendant's witnesses Lou Dixon Northrup and Irene Holmquist, by whom defendant offered to prove:

> That the witness Miller informed Northrup and Holmquist that she, Miller, intended to set up her own private house of prostitution and obtain girls to work therein, and that the defendant was going to do some work on and enlarge a building so that Miller could use it for a house of prostitution; and that, when Miller returned to Sitka, Alaska, from the states in January, 1942, she told Northrup and Holmquist in substance that she, Miller, would get even with the defendant for not building this house of prostitution for her, Miller, in accordance with their agreement, if it took her, Miller, the rest of her life;
>
> That Holmquist is a reputable housewife and has never been a prostitute or connected with prostitution in any way and had no criminal record of any kind to the best knowledge of defendant's counsel.
>
> That Northrup was formerly a prostitute and was present and working in the Lake View Cottage in Sitka, Alaska, in November, 1941, when Miller was working there and managing the operations of that house of prostitution; that Northrup had discontinued and for many months had not practiced prostitution, and recently had owned and personally operated her own small mercantile store

in Sitka, and for sometime last past had been employed as a laborer in the sawmill of the Columbia Lumber Company in Sitka, Alaska, and is and for many months has been living a reputable life. (Offer in verbatim, see: Tr. 182, 183).

Defendant had previously made her oral motion:

"We move at this time that the case be continued until the arrival of Lou Dixon Northrup and Irene Holmquist from Sitka. These two witnesses were subpoenaed as soon as the defense knew that the case would be on trial—that is day before yesterday—and they would have been here if it was possible for an airplane to get to Sitka and bring them here. They were prevented, the plane was prevented from going for and bringing them because of the Taku wind that was blowing yesterday and today. There is no other means of transportation that would get them here in less than sixteen hours, except an airplane. It is physically impossible for them to get here. It has been physically impossible for them to get here by any means of transportation since they were subpoenaed. This case was originally set for next Wednesday for trial and was moved up because in another case the defendant plead guilty and the case did not go to trial. The witnesses could have arrived here on a regular steamer, on the Northland, bringing them back to Juneau Monday. They would have arrived here not later than next Monday night, which would have been twenty four hours—

"The Court: You mean last Monday?

"Mr. Monagle: No. The Northland went yesterday to Sitka. Had the case come up on the date regularly set for it, they would have been here by Monday and the witnesses would have been here." (Tr. 181, 182.)

After making her offer of proof, defendant's counsel further said:

> "I would like also to add that the fees of the two witnesses have been advanced and arrangements have been made to pay their airplane fare and any delays and the cost of the charter trip on the airplane, and the only thing preventing the witnesses from being here is the inclement weather." (Tr. 183).

No refutation was made of defense counsel's statement. The subpoena is printed in full in the record. (Tr. 179). The return, showing service, is also printed in full in the record. (Tr. p. 180).

The United States Marshal stated that the subpoena "was wired day before yesterday to the deputy in Sitka, with instructions Mr. Monagle gave me that transportation was paid for and arranged and for them to come to Juneau. We got a wire back from the deputy that he served one and the other witness was in Lena Bay. * * * The subpoena was sent to Sitka, the original. He served a subpoena ticket, according to his wire, and notified the plane to pick her up on the way in." (Tr. 184).

Previously during the forenoon of April 6, 1945, (see Tr. 137 for date) defendant's counsel had informed the Court:

> "We have two witnesses who are subpoenaed to be here, and we have arranged for their transportation by airplane. It has been impossible to get them here. The case was set for trial next

Wednesday, and it is no fault of the defendant they weren't here or subpoenaed at any earlier date. We offered to charter a plane, but it hasn't been physically possible to get them here. The airplane company advised me that they would get them here this afternoon if it is possible to get to Sitka and Lena Bay. * * * * * It wasn't our purpose, and isn't our purpose to delay this trial, but the Court knows there was a case went by the board—the defendant plead guilty—which it was anticipated would be on trial at this present moment. Naturally we didn't subpoena our witnesses who we expected to get. * * * * * They were subpoenaed as soon as we knew this case was on trial. The subpoenas were sent by wire. It was the only physically possible thing we could do. If we had known, we could have got them over here Monday, but no planes flew over here yesterday whatever. I have checked with the airplane company—last night late and also this morning—they thought about two or three they might get over this afternoon." (Tr. 175, 176).

The Court: "I am not going to delay the case on that account. You are supposed to be ready any time the case is called. That is a rule of court." (Tr. 177).

Mr. Monagle: "The calender was only just set. The other case was set first. We didn't know—the defendant can't afford to bring witnesses weeks ahead like the government." (Tr. 177).

The Court: "It is just as much to the interest of the defendant to get her witnesses here as the government." (Tr. 177).

Mr. Monagle: "I don't mind a week ahead. We anticipated that." (Tr. 177).

The Court: "We are not going to wait on them. In any event, if they get here today, or in

the progress of the case, we will hear them, but otherwise we are not going to delay the case on that account. Has the government any rebuttal?" (Tr. 177).

Mr. Jernberg: "No, your Honor. The defendant hasn't rested." (Tr. 177).

Mr. Robertson: "The defendant hasn't rested, and we don't intend to rest until they get here. If the Court says we have to, we will make an offer of proof what the witnesses will testify." (Tr. 177).

The defendant then made her motion for continuance (Tr. 181, 182, 183), and her offer of proof (Tr. 182, 183), and called the Court's attention to having laid the foundation for the impeaching of the witness Miller by both these witnesses, that she made threats against the defendant (Tr. 185); which foundation was laid by the defendant asking the witness Miller when the latter was upon the stand, i.e.:

"Q. Isn't it a fact, Miss Miller, after you returned to Sitka the latter part of January or early February, 1942, and before your departure from Sitka, in March, 1942, sometime during that period in Sitka, Alaska, you approached Irene Holmquist, knowing she was a sister of Mrs. Anderson's, and told Irene Holmquist that you were going to get a revenge against Mrs. Anderson for having failed to build this house for you?

"A. No.

"Q. Wait a minute—and you were going to try to get her by accusing her of furnishing or aiding in furnishing transportation of these three

women from Seattle to Sitka, or in substance, didn't you tell Irene Holmquist that?

"A. I did not (Tr. 54).

"Q. Do you know a girl over in Sitka by the name of Lou Dixon or Northrup, that formerly was a prostitute in Sitka? (Tr. 55).

"A. I know her in a way. I am not very well acquainted with her.

"Q. Now, during this period, sometime during this period between the latter part of January and early February, 1942, and the date in March, 1942, when you left Sitka, did you not, in Sitka, Alaska, or vicinity, talk with Lou Dixon and tell her that you were going to get even with Maude Anderson because she failed to build this house for you, by accusing her of either furnishing or aiding in furnishing transportation of these three women from Seattle to Sitka?

"A. I did not.

"Q. Or tell Lou Dixon that in substance?

"A. No." (Tr. 56).

The Court, although recognizing the importance of this offered impeaching evidence, denied the continuance:

"In any event, and whether you did or did not, that is the very essence of your defense in this case, that this is a piece of spite work on the part of the prosecuting witness, and you do know that you must have that in even before the defendant is entitled to impeach, but that is no excuse for not having the witnesses here. It is true I called a criminal calendar last Friday, which was the 30th

of March, and I set the calendar tentatively, but I notified all defendants and their attorneys to be ready at all times whenever their cases were called. I only set a time tentatively and as a matter of convenience. The defendant has been here, to my knowledge for at least ten days or two weeks. There is no reason why, if these witnesses were available, they shouldn't have been here. The motion for continuance will be denied.

"Mr. Monagle: We ask for an exception, if it may please the Court." (Tr. 185, 186).

Defendant's witness Rands, to a question as to what witness Margie Miller had said about defendant, already had testified:

"A. Well, Margie was quite peeved and put out because the little house she figured on building wasn't built. I knew there was some riff between Margie . . . .

"The Court: Never mind. Tell what was said.

"A. She said she figured it would be built when she got back and it wasn't and that she—I asked her what she was going to do and she said probably she would have to be a mistress in this house or something." (Tr. 110).

The Court had also rejected defendant's offer to prove by herself that witness Miller was quite angry because, when she returned to Sitka in January, 1942, she found that defendant had not caused to have built the house which Miller wanted for her own house of prostitution (Tr. 174), which refusal is the basis of Assignment No. XV. (Tr. 248).

No opportunity was presented to defendant to later produce witnesses Northrup and Holmquist, even had the weather subsequently permitted their arrival in Juneau by airplane that very afternoon because immediately thereafter, save for the interposing of defendant's motion for a directed verdict and argument thereon and the Court's ruling thereon, the case went to the jury as the following proceedings show:

"The Court: Is there any other rebuttal?

"Mr. Jernberg: No rebuttal, if the Court please.

"Mr. Robertson: Before the Court calls in the jury . . .

"The Court: I understand the defense rests.

"Mr. Robertson: The Court overruled our offer. We rest subject to our motion and exception.

"The Court: The Court ruled on the motion. I am asking if there is anything further, if the defense rests?

"Mr. Robertson: We have nothing further. We move the Court to instruct the Jury to return a verdict of not guilty against the defendant on the grounds that the government entirely failed to make out a case. * * * * * (Tr. 186).

" * * * * * * * * * * *

"Thereupon argument was had by counsel for the respective parties and thereafter the jury was duly admonished and the Court then recessed until 10 o'clock a. m. the following day, April 7, 1945. * * * * *" (Tr. 192, 193).

The impeaching questions (Tr. 54, 55, 56), and the offer of proof (Tr. 182, 183) indisputably reveal that defendant intended to show the witness Miller, who was even characterized by the trial Court itself as being the "prosecuting" witness (Tr. 185), had the motive of revenge in giving her evidence against the defendant. The trial Court, also, at least impliedly, conceded such evidence was competent evidence, by referrring to the offered evidence as, "that is the very essence of your defense in this case, that this is a piece of spite work on the part of the prosecuting witness." (Tr. 185).

Animosity or motives of revenge undoubtedly may be shown to test the credibility of a witness. The Colorado court substantially said:

> Accused has right to show animus of the people's witnesses, and their interest and motives in testifying against him, and that a people's witness is actuated by motives of revenge against the accused * * * .
>
> *Trozzo v. People*, 117 P. (Colo.) 150.
> *Curtis v. People*, 211 P. (Colo.) 381, 382.
> *Furlong v. U. S.*, 10 F. (2d) 492.

> "Friendliness or animosity in general. As bearing upon credibility, it may be shown and considered whether the relations of a witness with or his feelings toward a party are friendly or hostile."
>
> 70 CJ 984, Par. 1149 (a).

We realize this Court has held that the continuance of a criminal trial is discretionary with the trial court;

but, we urge that the facts at bar disclose far more than simply that the defendant had sought to have witnesses brought at government expense from the States to Alaska and without showing that the facts, to which those intended witnesses would testify, could not be proved by other witnesses at or near the place of trial. The latter were, if we correctly understand the decision, the meagre facts in

Shea v. U. S., 260 Fed. (9 CCA) 807, 810.

In this case no denial is made that the desired witnesses Northrup and Holmquist would testify in accordance with the respective offers. (Tr. 182, 183).

True, the trial Court said:

> "I am not going to delay the case on that account. You are supposed to be ready any time the case is called. That is a rule of court." (Tr. 177).
>
> "It is just as much to the interest of the defendant to get her witnesses here as the government." (Tr. 177).
>
> "We are not going to wait on them. In any event, if they get here today, or in the progress of the case, we will hear them, but otherwise we are not going to delay the case on that account." (Tr. 177).
>
> "It is true I called a criminal calendar last Friday, which was the 30th of March, and I set the calendar tentatively, but I notified all defendants and their attorneys to be ready at all times whenever their cases were called. I only set a time tentatively and as a matter of convenience. The defendant has been here, to my knowledge for at

least ten days or two weeks. There is no reason why, if these witnesses were available, they shouldnt' have been here." (Tr. 186).

But, we urge the Court thereby in no wise refuted the defendant's contention: The subpoena was issued April 4, 1945 (Tr. 179), as soon as defendant knew the case would be on trial—that is the day before yesterday (Tr. 181); the trial commenced at 2 p. m. April 4, 1945 (Tr. 24); it had been originally set for next Wednesday (Tr. 175, 181), (Note: Next Wednesday would have been April 11, 1945), but was moved up because another case was not tried as the defendant in it plead guilty (Tr. 181), which latter case was set first (Tr. 177); the witnesses would have been present if it had been possible for an airplane to go to Sitka, but the Taku wind [†] prevailing yesterday (April 5) and today (April 6), prevented it; no means of transportation except airplane could get the witnesses to Juneau in less than 16 hours; it had been physically impossible to get the witnesess to Juneau since they were subpoenaed; no planes flew over yesterday whatever; defendant had arranged for their transportation by airplane, and offered to charter an airplane. (Tr. 175, 176, 177, 181, 182).

The United States Marshal corroborated the defendant that she had arranged and paid for airplane transportation. (Tr. 184).

In the face of defendant's undisputed diligence, immediately she knew her trial was to commence on April 4 instead of on April 11 as she had anticipated, [†] App. 1.

to obtain the attendance of the two witnesses which she was unable to do because of the weather conditions prevailing on April 5 and 6 (which facts give a faint picture of the difficulties encountered by litigants, at least in Southeastern Alaska, where the only means of travel between the communities of Juneau and Sitka is by either water or air and dependent at all times upon weather conditions), the trial Court denied the continuance of the trial until the two witnesses could arrive.

We submit that that ruling constituted an abuse of discretion which deprived defendant of her rights and constituted reversible error.

We urge that the Court's setting of her case to follow the trial of another, which latter case suddenly went by the boards because the defendant therein pleaded guilty, should not be held to penalize the defendant simply because neither she nor her counsel could foresee such unexpected quick ending of the other case and predict that weather conditions would arise to prevent defendant from having her witnesses in attendance for such advanced trial date of her own case.

(C) WITNESS BOWMAN'S TESTIMONY OF AGENT MILLER'S ACTS AND DECLARATIONS, MADE AND DONE BEYOND DEFENDANT'S PRESENCE, COULD NOT PROVE EXISTENCE OF AGENCY AND WERE INADMISSIBLE.

Over Defendant's Objections the government witness Bowman was permitted to testify:

"Q. What were the circumstances under which you met her?

"Mr. Robertson: We object on the ground that it is incompetent, irrevelant and immaterial, and not binding on the defendant.

"The Court: She may answer.

"Mr. Robertson: Exception.

"A. Well, I was brought to the hotel by Billy Day, and she was there.

"Q. What transpired at that time?

"A. She asked me if I wanted to go to Alaska.

"Mr. Robertson: I will renew my objection on the grounds that it is incompetent, immaterial and irrelevant, and transpired in the absence of the defendant.

"The Court: Answer the question.

"Mr. Robertson: Exception.

"A. She" (Miller) "gave me $70.00, and I bought a ticket on the North Coast to Sitka, Alaska, and left the next day for Sitka." (Tr. 85, 86).

This objection is the subject of Assignment IX. (Tr. 239, 240). Bowman therein related acts and declarations of Miller in Seattle, beyond defendant's presence. (Tr. 85).

The evidence was admitted in direct violation of the rule, viz:

"The rule cited by appellant that 'the declarations of an agent are not admissible to prove the fact of agency' refers exclusively to declarations made by the agent outside the courtroom."

Shama v. U. S., 94 F. (2d) 1, at 5.

(D) ACCOMPLICE MILLER'S TESTIMONY OF CONTENTS OF LETTER WHICH SHE CLAIMED DEFENDANT HAD WRITTEN TO HER BUT WHICH MILLER HAD DELIBERATELY DESTROYED BECAUSE SHE DEEMED IT INCRIMINATORY NEITHER CORROBORATIVE NOR ADMISSIBLE.

Over the defendant's objection "that it is not binding on the defendant, is not substantiated or authenticated, and is something that happened after the date of the defendant's being accused of committing the crime, and wouldn't be binding on her" (Tr. 40), and "we object to all testimony about this letter on the grounds that it is not authentic and there is no proof as to the date or time and it is incompetent, irrelevant and immaterial, and self serving on the part of the witness" (Tr. 42), the witness Miller, who plead guilty to the crime involved (Tr. 65) and who the Court characterized as being the prosecuting witness (Tr. 185) and as being "admittedly an accomplice in the crime charged against the defendant" (Tr. 201), testified to the contents of a letter, which she herself had destroyed (Tr. 39) before she returned to Sitka in January, 1942, because it would be evidence against herself and the defendant (Tr. 52), namely:

"In that letter Maude said the two girls hadn't shown up and she didn't know where they were. She was talking about the girls, the houses, and since the war was on they were having blackouts and that business was bad and she might have to close. She said she decided not to build on to her mother's house for me."

"Q. Did she state anything in that letter about Gloria Virginia Bowman? Yes. She said one girl had arrived by boat, but those on the plane didn't." (Tr. 42).

Witness Miller had previously testified in regard to this destroyed letter, viz:

"A. I received it when I was in Los Angeles, shortly after the war was declared. That would be along .....

"The Court: Before or after you sent the girls up here?

"A. After—that I received the letter.

"The Court: Did it have to do with the sending of these girls up here? A. Yes." (Tr. 40).

This letter, if ever written, must have been written, as so admitted by the witness Miller, after the commission of the crime, because Miller testified she remained in Seattle "Just long enough to get the girls and then I went to Los Angeles" (Tr. 52), where she received the alleged letter (Tr. 40). The witness Gloria Virginia Knapp Bowman said she didn't recall the exact date she arrived in Sitka, "but it was the latter part of November, almost December" 1941. "I

was there by December of 1941" (Tr. 86). Assuming she is the Jean LaRue listed on the ship's manifest, Plaintiff's Exhibit No. 2, the SS North Coast arrived in Juneau December 3, 1941 (Tr. 97). This Court will judicially notice that Pearl Harbor occurred on December 7, 1941.

Furthermore, unless the letter was written after the commission of the crime, the defendant could not have stated therein, as claimed by Miller, that "one girl had arrived by boat, but those on the plane didn't." (Tr. 42).

The defendant testified:

"Q. Now, you heard Margie Miller testify yesterday that you had written her a letter, or that she had received a letter from you when she was in Los Angeles, sometime in the fall of 1941, I believe she said around the first of December or thereabouts, in which you said in substance that the girls hadn't arrived in Sitka. Did you write Margie Miller any such letter?

"A. No, I didn't, for I didn't know any address of Margie's.

"Q. Did you write any letter whatever to Margie Miller after she left Sitka somewhere around Thanksgiving of 1941, between that date and say January 1, 1942? Strike that question. Did you write Margie Miller a letter at any time after she left Sitka in the fall of 1941 and until she returned in the spring of 1942?

"A. No, I did not.

"Q. Did you send Margie Miller any telegrams during the period after she left Sitka in the fall of 1941 and until she returned to Sitka in 1942? A. No." (Tr. 141, 142).

Not an iota of evidence was received, or even offered, to prove either the contents or the once existence of this alleged letter, except the testimony of Miller. Hence, only a moot question would lie upon which to base a discussion, inasmuch as it was, if ever, written after the the commission of the crime, of the admissibility or inadmissibility of the letter itself, if it had actually been produced.

But, what fairness can exist to extend the rule of the admission of secondary evidence to an instance, not where the primary evidence has been lost or mislaid, but where it has been deliberately destroyed? The witness Miller testified she destroyed the letter (Tr. 39). She sought to justify her destruction of it by the excuse: "Because it could be evidence against Maude and evidence against me." (Tr. 52).

She thus attempts to bolster up her verbal story with documentary evidence, true no longer extant, although she herself by its deliberate destruction has prevented defendant from inspecting it, from testing its date, hand-writing, language, form of construction, contents, signature. In fact, Miller herself by her own acts made it impossible to apply any of these tests, or to even prove such letter never existed except by a flat

denial thereof, which Defendant emphatically did. (Tr. 141).

The general rule on destroyed documents apparently is:

> "The rule admitting secondary evidence of the contents of a lost or destroyed writing must be so applied as to promote the ends of justice and to guard against fraud or imposition. It is not, therefore, a matter of course to admit secondary evidence of the contents of a writing upon proof of its destruction, but the cause or motive of the destruction is the controlling fact which determines the admissibility of such evidence."
>
> 22 CJ 1032, Par. 1320 (1)

The only explanation of the letter's destruction is that Miller deemed it might be incriminatory. But, if she is not telling the truth, then indeed ample fraudulent motive existed for her claiming she had destroyed it, because if she admitted its existence then she would have been obliged to have produced it. Surely her explanation is not sufficient within the rule:

> "The rule that a proper foundation for the admission of secondary evidence of destroyed writings includes a showing that the destruction was not caused by the voluntary act of the party proferring the secondary evidence does not apply where independent grounds for the admission of secondary evidence exist and the destruction can be satisfactorily explained."
>
> 22 CJS 1199, Par. 706.

We urge that the contents of this letter were not admissible under this Court's decision in

Ford v. U. S., 10 F. (2d) 739, 750,

wherein, in fact, the accused admitted the sending of the challenged telegram. The accomplice Miller destroyed the letter challenged herein. She testified to its purported contents. She is the prosecuting witness whose motives of revenge the Court under its rulings did not permit the defendant to put in evidence. Miller did not testify she knew defendant's handwriting. She did not actually state the letter was written by defendant personally. All she said was that she received the letter from the defendant. (Tr. 39).

Furthermore, Miller's verbal testimony of the contents of the destroyed letter still leaves the testimony Miller's only, and nobody else's, and is far below the Oregon standard of necessary requirement of corroboration of her evidence by some fact deposed to, independently all together of her evidence, which fact, taken by itself, leads to the inference not only that the crime was committed but that the defendant was implicated in it.

State v. Reynolds, 86 P. (2d) 413 at 418.

Defendant bases her Assignment IV on this objection. (Tr. 233, 236).

(E) TELEGRAM, PLAINTIFF'S EXHIBIT I, WHICH ACCOMPLICE MILLER TESTIFIED SHE SENT TO DEFENDANT, WAS ADMITTED WITHOUT PROOF OF HAVING BEEN SENT AT DEFENDANT'S REQUEST OR DIRECTION AND WAS NOT BINDING ON DEFENDANT.

Over the objection of the defendant, that "it was not binding on her, that it was incompetent, immaterial, and no proof or any indication of any request for the telegram, or no proof what the telegram might be referring to, and no basis" (Tr. 70) for its admission, the trial Court received in evidence a telegram, Plaintiff's Exhibit 1, which reads:

> "Alaska Communication System, Signal Corps.
>
> "United Army Army.
>
> "Received at 26 WXA B 14 WU
>
> "Seattle, Wash., Nov. 29, 1941, 5:30 a.m.
>
> "Maude Anderson, Lake View Cottage, Sitka.
>
> "Airmail two dresses today send coat on
>
> "North Coast need the three badly. Marg."
>
> (Tr. 70, 237).

Defendant reserved the objection as her Assignment VI (Tr. 237), in fact, at the first opportunity, even before the telegram was marked for identification she had objected that it "is not binding on the defendant," (Tr. 38), and saved the point by her Assignment III. (Tr. 231).

The witness Miller, who plead guilty to the crime involved (Tr. 65) and who the Court characterized as being the prosecuting witness (Tr. 185) and as being "admittedly an accomplice in the crime charged against the defendant" (Tr. 201), testified:

"Q. Did you advise Maude Anderson you had procured these three girls? A. Yes.

"Q. By what form of communication? A. Telegraph or code message." (Tr. 37)

"Q. I will show you Plaintiff's Exhibit A for identification and ask if that is the telegram you sent? * * *

"Q. To the defendant Maude Anderson, regarding three girls? * * *

"Q. Is that the telegram you sent?

"A. Yes; that is the same message any way." (Tr. 39)

That is the entire testimony concerning this message by the witness Miller. Nowhere did she testify she sent it at the request of the defendant, except such implications as may be gathered from her previous testimony:

"Q. Was there any arrangement made for you to notify Maude if you obtained any girls?

"A. We had a code message I was to use.

"Q. Tell the jury what that consisted of?

"A. Coats and dresses instead of girls, and instead of 'I am sending' use the words 'Please send me.' 'Please send me a dress by boat,' that meant a girl was coming by boat. If I said 'Please send me a dress by plane,' that meant a girl was coming by plane; so she would know when to expect the girl." (Tr. 26).

To bolster up her story, the witness Miller then continued:

"Q. You say it was Jackie Lugo who was present during the conversation. Do you recall what you were talking about when she was there?

"A. Yes. She only came through for a little bit. We were talking about this message. Maude was talking about it. I didn't want Jackie to hear it. I felt very bad about it at the time because we were discussing the message at the time."

Not until the witness Miller was asked the leading question: "Q. The code you were to use?" did she answer "A. Yes." (Tr. 26).

Previously the witness Miller had not said the witness Lugo was present when the "message" or "code" was dicussed, but simply:

"Q. Prior to the time of your departure on this trip did you have any conversation with Maude Anderson about the procurement of prostitutes.

"A. Yes, that was *understood.*" (Italics ours).

"Q. When and where did these conversations take place?

"A. In Maude's private bedroom.

"Q. Prior to your departure. A. Yes.

"Q. Who was present during these conversations?

"A. Mostly it was just between Maude and myself.

"Q. Did you have any conversation in which a third party was present? A. Only once was there any one present.

"Q. Who was that party?

"A. Maude and I were discussing the trip, and I remember Jackie walking through there.

"Q. Jackie who? A. Jackie Lugo. At that time she was Jackie Lugo." (Tr. 25).

It subsequently developed at the trial that Jackie Lugo was none other than the witness Mrs. Elvira Cavender (Tr. 75), who testified:

"Q. And prior to the time she" (Miller) "departed did you hear any discussion between her and the defendant Maude Anderson regarding the procurement of additional prostitutes for this house? A. Yes.

"Q. State when and where the discussion was that you heard.

"A. I don't know the exact day but it was during the day sometime. I was only in there for a matter of not more than two minutes. I heard Maude talking to Margie Miller as to how — — —'' (Tr. 75).

"Q. Just a minute. Where was this conversation?

"A. In Maude's bedroom, in her private bedroom.

"Q. In the house at Sitka?

"A. Yes, in that house at that time.

"Q. Who else was present at the discussion that took place.

"A. Maude Anderson, Margie Miller, and myself.

"Q. Tell the jury what was said that you overheard.

"A. I happened to go in for a few minutes so I would be able to make change. Maude was telling Margie how she would send the telegram or letter, whichever she was supposed to do. It was supposed to be sent in the form of a code. It was clothing, some kind of clothing. I don't remember —coats or dress. By the code it was in the form of clothing, and Margie was to send Maude in the form of a telegram.

"Q. To what were they referring when they were talking about this code?

"A. Well, it meant girls to bring up to Sitka." (Tr. 76).

Defendant's motion to strike the answer as incompetent and immaterial as to what was meant was denied (Tr. 76), and is the basis of Defendant's Assignment of Error No. VIII. (Tr. 238). The witness Cavender then further testified:

"Q. Do you know what was meant when they were talking about the code?

"A. Yes.

"Q. What did they say?

"A. It was girls. I heard the word 'girls' mentioned. I heard it.

"Q. Do you recall anything else that was said there or what the discussion was at that time?

'A. No. Just about the exchange of what the telegram was supposed to be about clothes and the girls.

"Q. Was anything said about when it should be sent?

"A. I didn't hear the time when it should be sent. No, I didn't.

"Q. At any time in your hearing, at this particular time and place, did Maude ask Margie to procure any girls for her?

"A. To me it looked that way.

"Q. Did she say anything about Margie getting her girls in Seattle that you overheard?

"A. Well, I didn't hear where she would get girls, but I heard that she would get girls and let her know through the wire in the form of clothes." (Tr. 77, 78).

On cross-examination the witness Cavender testified she heard the conversation shortly before the witness Miller went south but she didn't know the exact date; that she was in the defendant's private bedroom for about two minutes, getting change from the defendant, who was sitting in a chair and during the time Miller and defendant continued the conversation; that Cavender didn't remember whether Miller tried to conceal or hide what Miller and defendant were talking about; that she saw no code written out at that time. (Tr. 80, 81).

The government witness Mansfield testified he was present when the deputy Marshal arrested the defendant on August 31, 1944, and that a search was then made, with defendant's consent, of the house in which she was living, and that the telegram, Plaintiff's Exhibit 1, was found in a room, neighboring the one wherein she was arrested, in a bedstand or a small chest of drawers adjacent to the head of a bed, among other correspondence addressed to her and in a Valentine box (Tr. 68, 69); that the search was made after defendant's arrest, and that defendant's oral consent, so given after arrest, was later confirmed by her written consent. (Tr. 71, 72).

The defendant emphatically denied she ever had any conversation with the witness Miller about procuring any girls or making up a code (Tr. 120 to 125); but admitted she received the telegram, Plaintiff's Exhibit

No. 1, and stated she did not answer it and didn't know what it meant (Tr. 126); that the witness Mansfield found the telegram in defendant's mother's room in defendant's private home (Tr. 142, 143).

Again not only upon cross-examination by the U. S. Attorney but by the Court itself, defendant insisted she didn't know what the telegram meant, that she didn't do anything in response to it; that it didn't concern her; that she never answered it. (Tr. 159 to 162).

The telegram bears date November 29, 1941 (Tr. 70). The FBI agent found it nearly three years later, i.e.: On August 31, 1944 (Tr. 68), according to him with other miscellaneous correspondence in a room adjacent to defendant's (Tr. 69, 71), and according to defendant, in her mother's room in defendant's private home (Tr. 142, 143).

Defendant's treatment of the telegram bears out her contention that she knew not what it meant and it didn't concern her. If it in fact was a code, as testified by witness Miller (Tr. 26), between Miller and defendant, then the latter displayed a startling lack of precaution in allowing it to lie around intact, without even concealment, for nearly three years. Would a guilty conscience allow such a telegram to remain in existence for nearly three years, and without ever any discussion between the receiver and the sender about the latter's

having sent it, and even for some two and a half years after the sender had left Alaska? Miller permanently left Alaska in March, 1942. (Tr. 49).

Strangely enough the witness Miller's own conscience was so guilty she took the precaution before returning to Alaska in the latter part of January, 1942, to destroy the letter she claimed defendant wrote her (Tr. 52); but, we may well assume, otherwise she would have testified to it, her guilty conscience did not lead her, after she returned to Alaska at that time and during her stay there until in March, 1942, even though she claimed, "I asked her" (defendant) "if she collected my money from the girl, Virginia Bowman" (Tr. 43), to ever make inquiry whether the defendant had received the telegram, or to suggest that defendant, if she hadn't already done so, should destroy such incriminating evidence against herself, Miller.

Logically, one might think the witness Miller would have been more anxious to destroy a telegram which she claimed she had sent under her own name, than to destroy a letter which she claimed the defendant had written to her.

The record is bare of any evidence that the witness Miller's conscience ever troubled her about this telegram. If it had, we suggest she undoubtedly would have sought to obtain it from defendant or to destroy it, and would have so testified.

We submit there is no evidence that the telegram, Plaintiff's Exhibit No. 1, was sent at the request, either direct or implied, of the defendant, except the evidence of the witness Miller herself. That the telegram is nothing more than a self-saving statement made by Miller, not binding on the defendant, and does not fall within the principle of

Shama v. U. S., 94 F. (2d) 1, at 5.
Nokes v. U. S., 257 F. 413.

If a self-confessed perpetrator of a crime can thus corroborate her own story by the language of her own telegram from a thousand miles distance to the person she charges with being her accomplice in the crime, certainly the provisions of Section 5352, CLA 1933 (Infra, pp. 36) are no longer in effect.

We submit that the admission in evidence of Plaintiff's Exhibit No. 1 was reversible error.

(F) COURT REFUSED DEFENDANT'S REQUEST TO CHARGE ON SUBJECT OF CREDIBILITY OF ACCOMPLICE MILLER'S TESTIMONY, AS REQUIRED BY SECTION 4263, CLA 1933, AND ON SUBJECT OF NECESSITY OF ACCOMPLICE'S TESTIMONY BEING CORROBORATED BY INDEPENDENT EVIDENCE, AS REQUIRED BY SECTION 5352, CLA 1933, AND YET ITS OWN INSTRUCTIONS ENTIRELY IGNORED SECTION 4263, 4TH SUBDIVISION, AND MISSTATED AND MISCONSTRUED REQUIREMENTS OF SECTION 5352.

The government throughout maintained that the witness Marguerite (Margie) Miller was an accomplice; in fact, the Trial Court in its Instruction No. 5 (Tr. 201) specifically said: "Marguerite Miller is admittedly an accomplice in the crime charged against the defendant."

Alaska has in effect the law that a conviction cannot be had upon the uncorroborated testimony of an accomplice.

> "Testimony of Accomplice Must Be Corroborated. A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."
>
> Sec. 5352, CLA 1933.

This statute was taken from the laws of Oregon.

> Carters's Annotated Alaska Codes, Sec. 153, Part II, p. 70.
>
> Laws Oregon, Oct. 19, 1864; Hill's Ann. Law, S. 1370.

Alaska also has in effect the law that the court must instruct the jury in proper cases that the testimony of an accomplice ought to be viewed with distrust.

> "The jury * * * * are, however, to be instructed by the court on all proper occasions:
> " * * * * * * * * * *

"Fourth: That the testimony of an accomplice ought to be viewed with distrust and the oral admissions of a party with caution.

" * * * * * * * * * * "

Sec. 4263, CLA 1933.

This statute also was taken from the laws of Oregon.

Carter's Alaska Annotated Codes, Sec. 673, pp. 283, 284.

Therefore, when Congress by its Act of March 3, 1899 (30 Stat. 1285, 1302), adopted and made these laws of Oregon the laws for Alaska, undoubtedly the construction of the laws by the Oregon Court was then and there also adopted.

California's similar statute was adopted by Montana, and the Supreme Court of Montana said.

"And under the familiar rule of law that, in adopting a statute from a sister state, we adopt it with the construction given it by the courts of that state, there does not seem to be room for contention here."

State v. Connors, 94 P. (Mont.) 199, at 200.

The law is well stated in Alaska that a statute adopted from another state is adopted with the con-

struction placed upon it by the highest tribunal of that state. Presumably the statute is taken with the meaning it had in such state.

Steil v. Dessmore, 3 Alaska 392, 395

Moore v. Rennick, 1 Alaska 173, 177

Robinson v. Belt, 187 U. S. 41, 23 Sup. Ct. 16

Henrietta M. Co. v. Gardner, 173 U. S. 123, 19 Sup. Ct. 327

Willes v. Eastern Trust Co., 169 U. S. 295, 18 Sup. Ct. 347

Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644.

Prior to the adoption for Alaska by Congress on March 3, 1899, of Section 5352, the Oregon supreme court reversed a conviction for adultery because the testimony of the accomplice was not corroborated as provided by this statute and the trial court had refused to instruct the jury in accordance with the statute.

> "In the case at bar the only evidence of the commission of the crime is the testimony of the accomplice herself . . . From an examination of all the testimony in support of Mrs. Babb's statement, we conclude that it does not corroborate the material issue, or present facts from which the commission of the crime can be reasonably inferred, and hence, under the statute, was insufficient to support the conviction, and that the court erred in refusing to give the instruction requested, for which reason the judgment is reversed, and a new trial ordered."

State v. Scott, 42 Pac. 1.

The Oregon court similarly held that a conviction couldn't be had on the uncorroborated testimony of an accomplice in an incest case, viz:

State v. Jarvis, 23 P. 251.
See, also: *State v. Carr*, 42 P. (Ore.) 215, 217.

In construing Oregon's statute, identical with Sec. 5352, CLA 1933, supra, the Oregon court comparatively recently said:

> "What appears to be required is that there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed but that the prisoner is implicated in it."
>
> *State v. Reynolds*, 86 P. (2d) 413, at 418.

While we appreciate the Federal rule permitting conviction upon the uncorroborated testimony of an accomplice as stated by this Court in

Westenrider v. U. S., 134 F. (2d) 772,

yet we submit that rule does not apply in Alaska.

This Court has held that the Alaska District Court acts in a dual capacity (1) for administering local laws; and (2) for administering Federal laws; and that this Court's settled practice has been to exercise an independent judgment with respect to both general and local questions emanating therefrom.

Carscadden v. Territory of Alaska, 105 F. (2d) 377, 9 Alaska Reports 514, 527.

The Oregon court in the Scott case, after reviewing the common law on the subject of corroboration of accomplice testimony concluded:

> "Whatever the rule may have been at common law, the statute now provides that 'a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of its commission' Hill's Code Section 1371."
>
> *State v. Scott*, 42 P. (Ore.) 1.

We urge this statute is in effect in Alaska and governed the defendant's rights at her trial.

While we have not found any Alaskan decision directly construing the 4th subdivision, viz: "That the testimony of an accomplice ought to be viewed with distrust, and of the oral admissions of a party with caution" of Sec. 4263, CLA 1933, supra, yet we submit that this Court has at least intimated that it is proper to instruct the jury in accordance with this statute.

Shea v. U. S., 260 Fed. (9CCA) 807, at 810.

The not giving of an instruction pursuant to the California statute similar to Sec. 4263, CLA 1933, supra, has been held error.

People v. Bonney, 33 P. (Cal.) 98.
See also: *People v. Sternberg*, 43 P. (Cal.) 401.
People v. Stryke, 36 P. (Cal.) 3, at 5.

The only instruction given by the Trial Court in compliance with these two statutes was its instruction No. 6 (Tr. 202, 203), in which the Court quoted verbatim Sec. 5352, CLA 1933, supra, but in no wise clarified, to the contrary misconstrued, the provisions of the statute by stating:

> "In this connection I instruct you that the witness Marguerite Miller is what is known in law as an accomplice, and I further instruct you that the corroboration required by the statute is corroboration of the accomplice's testimony to the effect that the defendant Maude Anderson did actually commit the act constituting the crime charged, or aided or abetted in its commission." (Tr. 202).

In his qualification of the statute the trial Court entirely omitted the statutory requirement that the accomplice's testimony, to justify conviction, must be corroborated "by other evidence." The statute says: "unless he" (the accomplice) "be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." To say, as the Trial Court did in effect: "Corroboration is corroboration" means nothing whatever, but, if the language of the instruction means anything, we submit it can only be understood to mean that the jury need not be governed by the statute.

Is "corroboration" or "accomplice's testimony" modified by the phrase or clause in the instruction, viz.: "to the effect that the defendant Maude Anderson did

actually commit the act constituting the crime charged, or aided or abetted in its commission"? (Tr. 202).

We submit that any intelligent juror would understand, and that proper grammatical construction holds, that "accomplice's testimony", not "corroboration", is modified by that phrase or clause of the Court's instruction No. 6.

The divergent meanings of the entire sentence become apparent by modifying, first "corroboration", and second, "accomplice's testimony" by this particular phrase or clause.

If the phrase or clause is intended to modify "corroboration", then "corroboration", whatever it is, is to be to the effect that the defendant Maude Anderson did actually commit the act constituting the crime charged, or aided or abetted in its commission. Under those circumstances "something",—the trial Court didn't say the "something" was independent evidence from some source "other than witness Miller's mouth", or "evidence in addition to or in supplement of witness Miller's testimony"—might be "anything" which within the jury's imagination constituted "corroboration."

If the phrase or clause, as we submit it does, modifies "accomplice's testimony," then the jury was told that any "corroboration" even though it merely showed the commission of the alleged crime, was sufficient so

long as it supported the witness Miller's story that the defendant did actually commit the crime constituting the crime charged, or aided or abetted in its commission.

The statute itself does not treat "corroboration" so lightly. The statute defines "corroboration" by stating in effect, it must be "such other evidence as tends to connect the defendant with the commission of the crime."

Neither construction to be given to the trial Court's instruction No. 6, so defines "corroboration".

The statute further defines "corroboration" by stating "the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission."

Neither construction of the trial Court's instruction No. 6 so supplementarily defines "corroboration".

Perhaps, far flung imagination, may urge that such statutory definitions are included in that instruction if the clause or phrase, "to the effect that the defendant Maude Anderson did actually commit the act constituting the crime charged, or aided or abetted in its commission", is construed, contrary to grammatical rules and to sentence position, to modify "corroboration;" but, certainly even wildest zooming fancy can't include the statutory definitions if that phrase or clause modified "accomplice's testimony."

Are the defendant's rights of liberty and property to be jeopardized by guessing what Instruction No. 6 means or was intended to mean, and how the jury understood the sentence?

Then, too, neither in that nor in any other instruction did the trial court tell the jury that the testimony of the witness Miller, whom the Court despite defendant's objection (Tr. 208-9) had specifically characterized as being an admitted accomplice, ought to be viewed with distrust, and her oral admissions with caution.

Furthermore, the trial Court refused to give Defendant's Requested Instruction No. 6, viz.:

> "The laws of Alaska provide that the testimony of an accomplice ought to be viewed with distrust and that a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.
>
> "You are therefore instructed that you cannot find the defendant guilty of the crime charged in the indictment herein upon the testimony of the witness Miller alone or upon her testimony and other corroborative evidence which tends, if you so find, to connect the defendant with the commission of said crime but which corroborative evidence merely shows, if you so find, the commission of said alleged crime or the circumstances thereof.

"You are further instructed that you must find the defendant not guilty unless you find beyond a reasonable doubt that the witness Miller's testimony, if you find therefrom beyond a reasonable doubt that she and the defendant were accomplices in the commission of the crime charged in the indictment, was corroborated by other evidence and that such other corroborative evidence not only tended to connect the defendant with the commission of the crime charged in the indictment herein but also was of such nature that you find beyond a reasonable doubt that it more than merely shows the commission of said crime or the circumstances thereof." (Tr. 194).

The Court's stated reason for refusing this request was:

"Presented at 9:55 a. m. Saturday a. m. too late for consideration under our rules. Case finished Friday, 4:30 p. m. and Jury instructed Saturday, 10 a. m." (Tr. 194).

The trial court rule, apparently had in mind in that stated refusal, inasmuch as the trial Court at the instance of the U. S. Attorney required its inclusion in the Bill of Exceptions, was:

"Rule 30—Instruction to Jury. In every case, civil, or criminal, tried before a jury, the attorney for each side may, as soon as the jury is impanelled, submit to the court copies of such requests for instructions as he desires the court to charge; additional requests may be submitted at any time before the argument on the submission of the case to the jury is concluded; each request shall be on a separate sheet of paper, and counsel may cite

thereunder the authorities supporting each request." (Tr. 195). [3]

Defendant admits this Rule 30 at the time of the trial was and now is in effect, but urges:

1. That the rule is not prohibitive but permissive both in its intent and in its language;

2. The trial Court was not obliged to follow its own rule at the expense of committing an error;

3. The rule cannot be construed to repeal a statute; and

4. The rule is not binding on this Court.

Defendant submits that should the rule be construed as a fast, hard, hog-tied regulation, the self-evident result would follow: That, regardless of whether the defendant did or did not, in the defense of her liberty, rely upon Sections 4263 and 5352, CLA 1933, and their binding effect upon the courts, she must stand idly and speechless by, except to take exception to error in any instructions actually given by the court, without any recourse to direct the Court's attention to omissions of instructions required by those statutes, after the rule's time limit once passed.

Defendant does not know how she could call attention to such omission except by a request, oral or writ-

[3] App. 3.

ten. For example, the Court in its Instruction No. 6, or in any other Instruction, did not instruct as we heretofore said, the jury, substantially or otherwise, as required by Section 4263, CLA 1933, supra, "That the testimony of an accomplice ought to be viewed with distrust."

The defendant well might have been charged with negligence, or perhaps even with misleading the court, had she stood silent throughout the reading of the Court's instruction to the jury without mention that nowhere therein was the jury told "to view the testimony of an accomplice with distrust."

Probably no such bad faith could have been charged against her, had she, at the conclusion of the charge, said: "I take exception to all of the instructions because nowhere therein is the jury instructed 'that the testimony of an accomplice ought to be viewed with distrust.' "

We submit she pursued the much better procedure, and the only procedure to safely protect her rights, by submitting, even if after the time limit of Rule 30, supra, assuming it to be prohibitive and a time limit rule, her Requested Instruction No. 5, in which she

specifically asked the Court, in accordance with Section 4263, CLA 1933, supra, to instruct the jury: "The laws of Alaska provide that the testimony of an accomplice ought to be viewed with distrust." (Tr. 194).

The remainder of the first paragraph of Defendant's Requested Instruction No. 5 was based upon, in fact it was couched in the exact language of, Section 5352, CLA 1933, supra, requiring corroboration of accomplice testimony and defining the nature of such required corroboration.

We submit the second paragraph of Defendant's Requested Instruction No. 6 correctly stated the law in informing the jury: it could not find the defendant guilty

(a) Upon the testimony of the witness Miller alone; or

(b) Upon Miller's testimony and other corroborative evidence which

(1) tended to connect the defendant with the commission of the crime but which merely shows

(a) the commission of the crime, or

(b) the circumstances thereof.

We submit the third paragraph of Defendant's Requested Instruction No. 5 correctly stated the law in informing the jury it should find the defendant not guilty unless the jury found beyond a reasonable doubt

(a) That the witness Miller and the defendant were accomplices in the commission of the crime, and

(b) That the witness Miller's testimony was corroborated by other evidence which

(1) tended to connect the defendant with the commission of the crime, and

(2) was of such nature that it more than merely showed

(a) the commission of the crime, or

(b) the circumstances thereof.

We concede now, in the light of calmer reflection than is engendered by a heated court trial, possibly paragraph three of this Instruction is redundant; probably it is no more than a restatement in a slightly changed form from paragraph two, and vice versa; but, we submit, redundancy itself, when no ambiguity results therefrom, is not error, and, if redundancy existed, it did not justify the trial Court in refusing to give the requested Instruction.

In taking her exception (Tr. 209) to the Court's Instruction No. 6, defendant's counsel called the Court's attention to the Defendant's Requested Instuction No. 6 [3] and also to her Requested Instruction No. 5 which was based upon the law applicable to an alleged agent's declarations and acts binding her alleged principal and which was also refused for the stated reason that it was submitted too late (Tr. 193, 194) and also

[3] App 3.

Defendant's Requested Instruction No. ....., which the Trial Court also refused but with no stated reason. (Tr. 192).

Defendant's counsel then also stated:

> "We feel that that the Court's instruction does not bring out the fact that the statute requires that the corroborated evidence of an accompliee must go further than simply tending to connect the defendant with the commission of the crime. It isn't sufficient if it merely shows the commission or the crime or the circumstances of the commission of the crime, and it seems to us that the Court's language, particularly in lines 8 to 15 on page 7 of Instruction No. 6, does not thoroughly bring out the fact or that statute." (Tr. 209).

Defendant thus clearly directed the Court's attention to its error in its Instruction No. 6, and also to her own Requested Instruction No. 6, which regardless of whether or not submitted timely under the trial Court's Rule No. 30, correctly and succinctly stated the law under Sections 4263 and 5352, CLA 1933, supra.

Furthermore, defendant had previously directed the Court's attention not only to Section 5352, CLA 1933, but also to the necessity thereunder for corroborative evidence of accomplice testimony (Tr. 100, 102), by her motion (Tr. 99-102) made at the close of the government case in chief, which motion was denied (Tr. 102-103). That denial is the basis of Assignment No. XII (Tr. 241-242).

We urget hat the word "may" is used permissively, not prohibitively, in the trial Court's Rule 30; but, in any event, Sections 4263 and 5352, CLA 1933, supra, were binding upon the Court regardless of whether defendant called its attention to them timely under that Rule. We maintain that defendant's objection was sufficiently timely; but, even if not, we urge that the entire omission of an instruction under Section 5352, CLA 1933, supra, that the jury should view the testimony of the witness Miller with distrust, and the trial Court's misconstruction and ambiguous misstatement of the legal effect of Section 4263, CLA 1933, supra, constitute, plain, prejudicial error whereof this Court will notice of its own volition.

This Court has said in regard to a judgment of the same trial Court, viz.:

> "The Supreme Court of the United States has never declared the 'manifest error' rule applicable to Alaska. The settled practice in this court has been to exercise an independent judgment with respect to both general and local questions, probably because of the chance of conflicting decisions by the Alaska judges, without other remedy in the courts to avoid the conflict. In view of this settled practice we think we should continue to exercise our independent judgment with respect to appeals from the District Court of the Territory of Alaska, on all questions, whether federal, general or local, until required to 'abdicate' from that practice by a statute or a decision of the Supreme Court of the United States to the contrary. Compare: *White*

v. United States, 305 U. S. 281, 292, 59 S. Ct. 179, 83 L. ed. 172."

Carscadden v. Territory of Alaska, 105 F. (2d) 377, 9 Alaska Reports, 514, 527.

We submit that this Court is not bound by the trial Court's rule, and that that rule cannot obligate this Court to not heed an error, to ignore the statutes, to disregard defendant's rights.

Nor do other U. S. Circuit Courts of Appeal seem to hold they are powerless to heed error though not timely objected to.

Judge Sanborn said:

"The contention that proper objections were not made and proper exceptions were not taken, to permit the consideration in this Court of the issues which have been discussed, has not escaped attention; but it fails to convince. *Hall v. U. S.*, 150 U. S. 76, 80 ,82, 37 L. ed. 1003; *Waldron v. Waldron*, 156 U. S. 361, 380-383, 39 L. ed. 453.

"And even if it were tenable this is a trial for an alleged crime, it involves the liberty of the citizen, and the fault in the trial is so radical that it may well be noticed and corrected by this Court without objection, exception or assignment. *Wiborg v. U. S.*, 163 U. S. 632, 659, 41 L. ed. 289; *August v. U. S.*, 257 Fed. 388, 391, 393."

Skuy v. U. S., 261 Fed. (8CAA) 316, 320.

Subsequently the District of Columbia Circuit Court of Appeals held:

> "Heretofore this Court has noticed error which parties waived by failure to object at the trial in the trial court, to avoid injustice in criminal cases. There is no logical reason for refusing to exercise our power to notice fundamental error in cases where personal or property rights are involved, and our Rule 17 (i), which states the principle makes no distinction between civil and criminal actions."
>
> *Shokuwan Shimabukuro v. Higeyashi Nagayama*, 140 F. (2d) 13, at 15.
> See also: *Freed v. U. S.*., 266 Fed. 1012.

In a suit, wherein the liberty of the defendant was not involved but simply the recovery of compensation under a war risk insurance policy, the Fifth Circuit Court of Appeals, on the question of refusal to give an instruction because not presented timely under the local rule, held:

> "We think, however, that reversible error was committed in the giving and in the refusal of charges on the issue of permanent disability. Just before the judge gave his charge to the jury, the defendant presented and requested the giving of five special charges. These were refused under Rule 13, a local rule, on the ground that they had been presented too late for adequate consideration. * * * * *
>
> "We think the court erred in both giving the charge it did, and in refusing to give the charges defendant asked for. Rule 13, on which the action

is based, is a salutary rule of general application. It is designed to, and it ordinarily will, operate to aid the court in securing a correct submission to the jury. It was not intended to be, it should not be enforced so as to prevent a full and clear submission of defense theories even though not timely presented, when, as here, the charges are few in number and simple in scope and effect."

United States v. Ellis, 67 F. (2d) 765, 767.

Subsequently and in 1940 the same court held in a personal injury suit, i.e.:

"Appellee has argued that the plaintiff failed to make its request for instructions within the time contemplated by Rule 51 of the new Rules of Civil Procedure, 28 U.S.C.A. following Section 723c and Rule 18(5) of the local district court. But the request was made before the case was submitted to the jury, and it appears that the court considered the request and ruled upon it, and that Peterson saved exception when the court gave no instruction on the subject of the request. We think that review should not now be refused."

Peterson v. Sheridan, 115 F. (2d) 121, 126.

So here, we urge that the trial Court's rule No. 30 should not be so enforced as to deprive defendant of her right to have the jury correctly instructed in accordance with Sections 4263 and 5352, CLA 1933. supra. [2]

[2] App. 2.

(G) COURT REFUSED DEFENDANT'S REQUEST TO CHARGE, NOTWITHSTANDING COURT ITSELF GAVE NO CHARGE ON SUBJECT OF NECESSITY OF PROPER PROOF OF RELATIONSHIP OF AGENT AND PRINCIPAL BETWEEN MILLER AND DEFENDANT.

Defendant by her Requested Instruction No. V asked the trial Court to charge:

> "You are instructed that acts or declarations, which were done or made by the witness Margerie Miller and which were claimed to be done or made by her on behalf of the defendant, in any wise connected with the alleged commission of the crime charged in the indictment herein are not to be considered by you in your deliberations unless you find beyond a reasonable doubt from evidence, other than the testimony of said witness Miller, that said witness Miller was the agent of the defendant in doing said acts or making said declarations.
>
> "In other words the witness Miller cannot by her own acts or declarations establish herself to have been the agent of the defendant in the alleged commission of said crime because the relation of agency, if any, between the witness Miller and the defendant must be established by affirmative evidence other than the acts, statements or declarations of the witness Miller.
>
> "You are therefore instructed that regardless of what acts or declarations the witness Miller admitted she did or made in the commission of said crime, you should not find that she did or made any of them as agent of the defendant unless you first find beyond a doubt from other evidence than said witness Miller's testimony, as herein-

above instructed, that said witness Miller then and there was the agent of the defendant." (Tr. 193). This Request is the basis of Assignment No. XXII.

(Tr. 262). It was rejected for the stated reason:

"Presented at 9:55 a.m. Sat. a.m. too late for consideration under our rules. Case finished Friday, 4:30 p.m., and jury instructed Saturday, 10 a.m." (Tr. 193).

Inasmuch as we discuss a similar stated reason of rejection in connection with the rejection of Defendant's Requested Instruction No. VI for a similar stated reason (This brief, pp. 45-54), we do not now reiterate that discussion.

Nowhere in its instructions, did the Court charge the jury in accordance with the principle of this Request.

True, in his Instruction No. V, the Court defined accomplices and quoted Section 5044, CLA 1933, defining principals (Tr. 201, 202); and in its Instruction No. VI, the Court quoted Section 5352, CLA 1933, prescribing the necessity of corroboration of accomplice testimony (Tr. 202, 203).

We contend that both of those two instructions were erroneous; but, we do not here repeat our discussion of those errors because we elsewhere discuss them. (This brief pp. 41-44).

Defendant's Requested Instruction No. V was based upon the well recognized principal, viz.:

> "Unless the agency is already apparent or is admitted, or unless the statement has been ratified, the relation of agency between the declarant and the person against whom it is sought to use his admission must be established by affirmative evidence other than the declarations or statements of the alleged agent."
>
> 22 CJ 376 Par. 441 (2).

The Request did not ask the Court to charge that the witness Miller's acts and declarations were inadmissible.

The charge requested was succinctly: That Miller by her own acts and declarations could not prove herself to be defendant's agent in the crime's commission. It thus is essentially different from Defendant's Requested Instruction No. VI (Tr. 194), which asked the Court to charge the jury as to the corroboration, necessary to accomplice testimony, before a conviction can be had. Such corroboration is a requirement under Sec. 5352, CLA 1933.

We believe the Request was well within the scope of the decision in

> *Shama v. U. S.*, 94 F. (2d) 1, at 5. (8 CCA).

We do not understand the language,

> "It is well settled that, when on the witness stand, the agent may testify what his principal told him to do, and by such testimony establish the fact of the agency,"

in that decision to mean, and we urge it does not mean, that the agent by the agent's own acts and declarations can establish the fact of the agency. That was all the Request asked, namely: That Miller by her own acts and declarations could not prove herself to be defendant's agent in the crime's commission.

Its essential difference, thus required its giving, in addition to Defendant's Requested Instruction No. VI (Tr. 194), asking the Court to charge as to the corroboration, required by Sec. 5352, CLA 1933, of accomplice testimony, before a conviction could be had.

State v. Jarvis, 23 P. (Ore.) 251.

Consistently with this theory Defendant moved (Tr. 66, 67), to strike the witness Miller's testimony at its close, which was denied upon the then stated ground of untimeliness. (Tr. 67). At the close of the government's case, Defendant renewed her motion (Tr. 99, 102), which the Court denied (Tr. 102, 103), and which is the basis of Assignment No. XII, (Tr. 241, 242).

Thus, throughout the trial, defendant maintained she could not be proved to be the principal of the witness Miller by the latter's acts and declarations alone.

(H) COURT REFUSED DEFENDANT'S REQUEST TO CHARGE THAT NO CRIME WOULD BE COMMITTED, BUT ON THE CONTRARY CHARGED THAT A CRIME WOULD BE COMMITTED BY DEFENDANT'S PROMISE OF AGREEMENT WITH MILLER TO PAY OR FURNISH THE MEANS OF TRANSPORTATION OF THE GIRL TO BE TRANSPORTED EVEN THOUGH DEFENDANT DID NOT ACTUALLY PAY OR FURNISH ANY SUCH MEANS OF TRANSPORTATION.

The trial Court refused (Tr. 192) Defendant's Requested Instruction No. ....., reading:

> "You are instructed in this case, before you can find the defendant guilty, you must find beyond a reasonable doubt that the defendant did wilfully, unlawfully, feloniously and knowingly transport and cause to be transported and aid and assist in obtaining transportation for and in transporting, in interstate commerce, the witness Gloria Virginia Knapp Bowman alias Jean LaRue from Seattle to Sitka.
>
> "And unless you find that the defendant did so transport, caused to be transported, or aid and assist in obtaining transportation for such witness Bowman you must find the defendant not guilty. And you are instructed that to transport or cause to be transported means that the defendant either herself transported or else furnished the means to transport, and that to aid or assist in obtaining transportation means to furnish means which either did or helped to transport such witness Bowman from Seattle to Sitka, and that a promise or agreement by defendant to furnish the means of such transportation, if she did not actually furnish such or any of such means of

transportation, does not constitute the defendant guilty of the crime with which she is charged." (Tr. 192).

This refusal is the basis of Assignment XXI . (Tr. 261, 262.)

The Court in its Instruction No. 6 did charge:

"It is not necessary, however that the defendant be present at the time the arrangements were perfected pursuant to which Jean LaRue came to Sitka, if you believe such arrangements were made, or that the defendant paid her transportation or any part thereof. It is sufficient if she agreed with or directed the witness Marguerite Miller that she, the said Marguerite Miller, should procure a girl or girls for her to be transported in interstate commerce for the purpose of prostitution or other immoral purposes, or agreed to pay such girl's transportation or other expenses in connection therewith, and that pursuant to such agreement or directions that the witness Marguerite Miller procured the girl Jean LaRue to come from Seattle, Washington, to Sitka, Alaska, for the defendant, for the purpose of prostitution or other immoral purposes and that defendant agreed to reimburse or pay the witness Marguerite Miller for said girl's transportation or expenses or any part thereof." (Tr. 202, 203).

Defendant excepted to this charge, viz.:

"We also take exception to the Court's Instruction No. 6. In that connection I call attention to * * * * the Requested Instruction I handed the Court yesterday. * * * * We also except to lines 14 to 32 on page 7 of Instruction No. 6, because we

contend that is contrary to the law, that the defendant must have actually done something other than making an agreement or a promise, that she must have either actually caused the transportation or supplied means to aid or help in the transportation, as we tried to set forth in the Requested Instruction 1 we filed with the Court yesterday." (Tr. 209).

This exception is included in Assignment XX. (Tr. 259, at 261).

The Court thus charged diametrically opposite to Defendant's Request.

The Indictment (Tr. 2) is laid under Section 398, USCA Title 18, 36 Stat. 825 (Tr. 197, 198.) It is not a conspiracy statute.

We are not unmindful of the rule,

> "Responsibility for crime is not limited under the federal statute to those who do the overt acts. It extends to all who knowingly and wilfully take a hand in it within the act defining a principal."
>
> *Scrader v. U. S.*, 94 F. (2d) 926 (8CCA)

but in that case the defendant was informed the girl lived in Missouri and that procurer was active in procuring the girl, and she endeavored to induce girl to commence prostitution, and pictured the money the girl would make, and apparently in the girl's presence told the procurer "I guess she will be down Friday;" thus actively trying to induce the girl to come from Missouri to Illinois to practice prostitution.

The prostitute had previously worked for defendant, in

Baish v. U. S., 90 F. (2d) 988, 989.

The agreement, if any, did not indicate any interstate commerce was involved. Witness Miller testified:

> "She wanted me to get some girls. She was dissatisfied with the girl she had. The girl had been drinking and she thought she wanted some more girls. There was a soldiers' pay day coming, and I was to go down and make arrangements whereby I could get some girls. She said she would kick what she had out as soon as I got the other girls. * * * She said for me to get them and if they didn't have the fare to advance it and she would collect and have the money by the time I got back." (Tr. 25, 26).

Thus, reimbursement of the money was to be made by the girls, not by defendant. Miller repeated that phase of the purported agreement by stating the arrangement, for repayment of the $70.00 she advanced Gloria Bowman (Jean LaRue) for transportation, cab fare, and spending money, was: "I told her" (LaRue) "to give the money to Maude." (Tr. 27.) Later, in response to the Court's questioning, Miller said, she had no interest in Gloria Bowman, the money she advanced Bowman she advanced for defendant under a previous arrangement with her, and that Bowman was to repay it to Maude. (Tr. 30.) Miller, upon her return to Sitka from Seattle, asked defendant, "if she collected my

money from" Gloria Bowman (Tr. 43), and in connection with the alleged settlement between herself and defendant said: "The money the Bowman girl owed me, and the other money, Maude said she would let me have that towards the rent of the cottage I was living in." (Tr. 44.)

Defendant herself first met Bowman (LaRue) on December 3 or 4, 1941, in Sitka. (Tr. 121.) There is no denial of that fact. Bowman testified, "Down in Seattle I received $70.00 or close to it from Margie Miller and I was supposed to pay Maude Anderson,"(Tr. 88), and that the first time the defendant spoke to her about repaying the $70.00 was just before Bowman left to move into another house (Tr. 89, 92), but Bowman never repaid the $70.00 to defendant (Tr. 92), and Miller herself did not claim defendant ever repaid her the money other than by crediting unpaid rent due from her to defendant. (Tr. 44).

We consider it proper to point out this factual evidence in discussing the Court's Instruction No. 6 and Defendant's Requested Instruction No. ...., because of its great difference from the facts which apparently induced the decision in *Schrader v. U. S.*, supra.

The evidence herein, in our view, does not show that defendant promised or agreed to repay Miller for the cost of transporting Bowman to Sitka from Seattle or

any other place; but, at the most, under Miller's version, defendant did no more than agree to collect from Bowman such money as Bowman became indebted for to Miller by Miller advancing Bowman the transportation. We submit an agreement to collect a debt, even though the debt is founded upon an immoral consideration, for another is not a crime and could not constitute aid or assistance in the transportation of Bowman for immoral purposes in interstate commerce. Furthermore the act of collecting, if defendant had collected the money, which she did not (Tr. 92), would have occurred after the crime had been accomplished.

Briefly, we submit "the act of collecting," after the commission of the crime, or even the promise to collect from the girl transported the cost of her transportation, could not possibly aid or assist in transporting or obtaining transportation for that girl.

Hence, we urge that Defendant's Requested Instruction No. .... should have been given because it stated a correct premise under the statute, with the violation whereof defendant was charged.

(I) COURT'S INSTRUCTIONS PLACED BURDEN UPON DEFENDANT TO PROVE SHE WAS NOT AN ACCOMPLICE OF WITNESS MILLER.

In its Instruction No. 5 (Tr. 201, 202), the Trial Court said:

"In the prosecution of this case the Government relies to some extent upon the testimony of Marguerite Miller. *Marguerite Miller is admittedly an accomplice in the crime charged against the defendant.*" (Italics ours).

" 'Accomplice's are defined as all persons who participate in an offense as principals, and 'principals' as all persons acting together in the commission of an offense."

The Court then quoted verbatim Section 5044, CLA 1933, which substantially defines principals as being all persons concerned in the commission of either a felony or misdemeanor whether they directly commit the crime or aid and abet in its commission, though not present, and to be tried and punished as such. The Court then continued:

"You are, therefore, instructed that, if you believe from all the evidence in this case beyond a reasonable doubt that the defendant Maude Anderson was concerned in the commission of the crime charged or aided or abetted in its commission, though not present, and whether she directly committed the act constituting the crime or merely aided or abetted in its commission, though not present, you may find her guilty as a principal."

Defendant's objection to this instruction was:

"The defendant takes exception to the Court's Instruction No. 5, page 6, and calls the Court's attention to the fact that the language, in the defendant's opinion, puts a burden upon the defendant as though it was admitted in the case that she is an accomplice whereas

the only admission, by our view, is the admission of Margie Miller that she is an accomplice. I submit the burden is upon the Government to prove that the defendant is an accomplice of Margie Miller." (Tr. 208-209).

In response to this objection, the trial Court made no amendment, correction, amplification or explanation of the language of the Instruction, but simply commented: "I say that Margie Miller has admitted being an accomplice." (Tr. 209).

While defendant concedes that the witness Miller did admit she was an accomplice of the defendant, the witness Miller only and nobody else ever testified that the relation of accompliceship existed between her and the defendant.

The Court readily could have amended its instruction by at most the use of two or thre words to inform the jury that what the Court meant was that the witness Miller had admitted that she was an accomplice in the crime charged against the defendant.

But, the Court did nothing of the kind. It let the instruction stand, and in that identical form sent it to the jury.

Under the Alaska law the instructions are taken by the jury with them to the jury-room for their use while considering the evidence and arriving at their verdict.

> "When the jury had been completed and sworn the trial shall proceed in the order prescribed in this section unless the court for special reasons otherwise direct.
>
> " * * * * * * *
>
> "When the evidence is concluded the court shall charge the jury; such charge shall be reduced to writing and read to the jury. Each party shall prepare and submit such instructions as he deems material to the case and the court may hear them upon the propriety of the requested instructions before finally settling the charge that he will give. * * * * * * After the argument shall have been concluded, the jury shall retire to consider the verdict, and shall take with them to the jury room the written charge given them by the court."
>
> Sec. 3591, CLA 1933.

The jury did so in this action. See first paragraph of trial Court's Instruction No. 11 (Tr. 208).

We submit a vast distinction exists between telling the jury, as the Court did, that "Marguerite Miller is admittedly an accomplice in the crime charged against the defendant" (Tr. 201), and telling the jury, which the Court did not, that "the witness Miller admits she was an accomplice in the crime charged against the defendant."

Not only was the jury thereby left with the impression, and surely the jury had the right to presume that the Court's language meant, that the relation of accompliceship existed between the witness Miller and the defendant in the commission of the crime charged, stood in the case as an admitted fact concerning which no reasonable doubt existed and in controvention whereof defendant had offered no evidence.

The trial Court emphasized that impression by immediately following its statement, that "Marguerite Miller is admittedly an accomplice in the crime charged against the defendant", with the further language that "Accomplices are defined as persons who participate in any offense as principals, and 'principals' as all persons acting together in the commission of an offense."

No jury could be conceived of such stupidity as would not understand and grasp from that definition that the witness Miller could not be an accomplice of the defendant without the defendant contemporaneously being an accomplice of the witness Miller in the crime charged against the defendant, and that, since the witness Miller is admittedly an accomplice, she is a principal, and that therefore the defendant also was a principal in the commission of the crime.

Nor did the trial Court qualify its language in the subsequent portion of its Instruction No. 5 or in any

other Instruction; in fact, the remainder of Instruction No. 5, after quoting verbatim Section 5044, CLA 1933, consists of the general language in substance, that if the jury from all the evidence believed beyond a reasonable doubt the defendant was concerned in the commission of the crime or aided or abetted in its commission, though not present, and whether she directly committed the crime or merely aided or abetted in its commission, though not present, the jury might find the defendant guilty as principal (Tr. 202).

The defendant testified:

"Q. She (Miller) testified that during that conversation it was agreed she should go to Seattle and get some girls for you, is that true?" (Tr. 119).

"A. That is not true." (Tr. 120)

"Q. What did Margie Miller say she was going to Seattle for?

"A. Stuff to furnish up that place. Nothing was mentioned about girls. I never had any talk with her about girls at no time." (Tr. 120).

"Q. Did you at any time—I will reframe that—during this conversation, is it true or not that a code was made up between you and Margie Miller, as Margie Miller testified?

"A. Absolutely not.

"Q. No such arrangement was made?

"A. Absolutely not.

"Q. Did you write to Margie Miller about bringing one or more girls or any girls?

"A. Absolutely not.

"Q. To Sitka from Seattle?

"A. Absolutely not.

"Q. Did you have any agreement about her procuring any girls and sending them to you?

"A. Absolutely not." (Tr. 120).

"Q. Had you at any time made arrangements, made any arrangements with Margie Miller with reference to bringing her" (witness Gloria Virginia Knapp Bowman) "to Alaska.

"A. I did not.

"Q. Did you at any time give Margie Miller any money with which to bring this LaRue or Bowman, or any other girl from Seattle?

"A. No, sir.

"Q. Did you ever promise to pay Margie Miller or any one else any money to bring Virginia Bowman or Jean LaRue, or any other girl from Seattle to Sitka, Alaska?

"A. I did not." (Tr. 123).

Further plain, emphatic denials by defendant of her having any part in the crime appear in her testimony. (Tr. 124-131). We will not encumber this brief by repeating them.

We believe no challenge will be made to defendant's contention that the burden was upon the government to prove beyond a reasonable doubt that the defendant was an accomplice of the witness Miller and a principal in the commission of the crime.

We submit that the trial Court by its flat statement that "Marguerite Miller is admittedly an accomplice in the crime charged against the defendant," erroneously removed that burden of proof from the government and placed it upon the defendant.

The witness Miller admitted herself to be an accomplice in the commission of the crime; hence, her testimony was accomplice testimony and subject to the rule of necessary corroboration, but her admission did not remove the burden from the government to prove beyond a reasonable doubt that the defendant was an accomplice of the witness Miller and therefore a principal in the commission of the crime which the witness Miller admitted.

(J) ENTIRE LACK OF INDEPENDENT EVIDENCE, AS REQUIRED BY SECTION 5352, CLA 1933, TO CORROBORATE THE ACCOMPLICE MILLER'S TESTIMONY.

We believe that Assignment No. XVIII (Tr. 255 to 257), which is based upon the Court's denial of Defendant's Motion for a Directed Verdict (Tr. 186 to

191), and Assignment No. XXIV (Tr. 265), which is based upon the error in receiving and filing the verdict of guilty (Tr. 5), and Assignment No. XXV (Tr. 265), which is based upon the Court's denial of Defendant's Motion for Acquittal (Tr. 5), and Assignment No. XXVI (Tr. 265), which is based upon the Court's denial of Defendant's Motion for Judgment Notwithstanding the Verdict (Tr. 6), and Assignment No. XXVII (Tr. 266), which is based upon the Court's denial of Defendant's Motion for a New Trial (Tr. 7), and Assignment No. XXVIII (Tr. 268), which is based upon the erroneous entry of judgment (Tr. 10) against the defendant, can be logically and properly presented together under the above captioned point, because they are all based upon the same fundamental errors.

We propose now to show the defendant's conviction rests upon the testimony of Margie Miller; who was an accomplice, and whose testimony was not corroborated as required by Section 5352, CLA 1933.

Miller's admission of her participation in the alleged commission of the crime made her an accomplice. *State v. Scott,* 42 Pac. 1, ante. She pleaded guilty to the crime charged (Tr. 46, 65). And the trial court instructed the jury that "the witness Marguerite Miller is what is known in law as an accomplice," (Tr. 202).

The witness Miller, on whom the prosecution must rely for defendant's conviction, testified that during and prior to November, 1941, she was practicing her profession as a prostitute at Sitka (Tr. 46); that she was operating the defendant's house of prostitution at Sitka (Tr. 46) "on halves" (Tr. 47, 57); that the defendant agreed to build a place at Sitka so that Miller could have a house of prostitution "of my own" (Tr. 29); that she quit running Maude's house—gave it up—about a week before Miller left for Seattle (Tr. 57); that Miller rented a cabin from Maude (Tr. 57, 58) which Miller retained while she was outside; that Miller left Sitka on a trip to Seattle (Tr. 29) in November, 1941, (Tr. 46); that Miller arranged for furniture for her own house of prostitution (Tr. 58) "linens, bedding, a stove and I think a couple of chairs. She (Maude Anderson) had some furniture in her barn I was going to use" (Tr. 58); that furniture ordered by Miller arrived in Sitka "sometime while I was gone" (Tr. 58); that prior to leaving Sitka for Seattle Miller had "a conversation with Maude Anderson about going to Seattle and procuring some girls for prostitution in Sitka" (Tr. 46); that in Seattle Miller procured Bowman (Jean LaRue), the girl named in the indictment, (Tr. 27) and made arrangements "with her to come up here and to leave on the same boat I went down on"; and advanced her $70.00 "of my own money" (Tr.

27, 86) for "transportation, cab fare, and some money to have while on the boat, a little bit to spend" (Tr. 27); and "told her to give the money to Maude" (Tr. 27, 30) to pay it back to Maude (Tr. 30); that Bowman "went and bought a ticket, and came back and showed me the ticket" (Tr. 31); that Bowman left on the boat North Coast (Tr. 31); that she went to Sitka and there worked as a prostitute (Tr. 31); that Miller got two other girlh in Seattle (Tr. 32, 34, 35); and made arrangements for them to go to Sitka by plane, and advanced them the fare "as I did the other girl" (Tr. 37); "I gave one 140 some dollars and the other 120 some" (Tr. 63) "of my own money" (Tr. 64); that they did not go to Sitka, they got kicked off the boat (Tr. 49).

Miller testified (Tr. 25) that she procured the prostitutes and arranged their transportation for the defendant, by arrangement made with defendant prior to the time she (Miller) left Sitka (Tr. 25, 29); that Miller was to advance the money for the girls' transportation, if the girls didn't have it, and defendant would collect and have the money by the time she (Miller) got back to Sitka (Tr. 26); that they had a code message (Tr. 26, 60) which Miller was to use; that Miller sent defendant a code message advising that the girls had been sent (Tr. 39), that while outside Miller received a letter from defendant (Tr. 42) saying that the Bowman girl showed up but the other two girls did

not show up (Tr. 42); and that on account of the war she (Maude Anderson) had decided not to build "on to her mother's home for me" (Tr. 42); that she (Miller) destroyed the letter (Tr. 39, 52) "because it could be evidence against Maude and evidence against me" (Tr. 52); that Miller returned to Sitka in January, 1942, and went over to defendant's place (Tr. 43) and had a conversation with her (Tr. 43); "I asked her if she got my money, if she collected my money from the girl" (Tr. 43); that defendant said "No, the girl wouldn't pay it to her"; that "the girl denied it and wouldn't pay her any money, she said she tried to collect it" (Tr. 43, 44) that defendant objected to paying to Miller the money Miller had advanced but "I convinced her I had it coming to me" (Tr. 51); "I had some money coming to me from the girls that were supposed to come by plane and didn't show up, the money the Bowman girl owed me, and the other money, Maude said she would let me have that towards the rent of the cottage I was living in" (Tr. 44); that defendant did not advance Miller any money, and did not repay Miller any money (Tr. 50, 52); that all the money for the unlawful transportation was put up by Miller (Tr. 27); that "no money, no check, no bank draft of any sort,—no dime of any kind" was given by defendant to Miller to aid or assist in the unlawful transportation (Tr. 50); that defendant was not present when the unlawful transportation was arranged by Miller; and that all the arrangements for girls, and all arrangements for their transportation were made by Miller (Tr. 27).

Such, in substance, was the testimony of the accomplice Miller. It shows that there was no actual transportation of Bowman by either Miller or the defendant. It shows only that money was advanced to aid and assist in obtaining transportation, and that such money was advanced by Miller. It shows that every act and declaration done to procure Bowman to go to Sitka for the purpose of prostitution, and every act and declaration done to furnish Bowman transportation from Seattle to Sitka for such purpose were done and committed by the witness Miller personally. It shows that defendant was not present when such acts and declarations were commited by Miller.

There is nothing whatever in Bowman's testimony, or in any other testimony independent of that of accomplice Miller, that Bowman (or the other two girls) was to repay transportation fare to defendant, either for her or for Miller. Bowman's testimony affirmatively shows that she did not pay defendant the money advanced to Bowman by Miller for transportation (Tr. 92); *but that Bowman did pay "most of it" back to Miller* (Tr. 92), *and still owes Miller "part of the money", advanced by Miller for Bowman's fare to Sitka.* (Emphasis ours).

The defendant contends that all of Miller's testimony; that she had made arrangements for the defendant to build a place at Sitka so Miller could have a house

of prostitution "of my own" (Tr. 29); Miller's arrangement for furniture for her own house of prostitution (Tr. 58) which arrived at Sitka while Miller was outside (Tr. 59); Miller's procuring girls and arranging for their transportation to Sitka; Miller's testimony that she received a letter from the defendant while she (Miller) was outside on such business to the effect that on account of the war defendant had decided not to build (Tr. 42) the three rooms Miller wanted for her own house of prostitution, IS NOT CONSISTENT with Miller's testimony that she procured the girls and arranged for their transportation to Sitka "for Maude" (Tr. 25). Miller's testimony IS CONSISTENT with defendant's defense, and the theory, that Miller was acting wholly for herself,—to accomplish her own motive and purpose in obtaining and transporting the prostitute Bowman from Seattle to Sitka for Miller's own house of prostitution. And Miller's instructions to Bowman to go to defendant's place on her arrival at Sitka (Tr. 86) IS ENTIRELY CONSISTENT with an intent and purpose on Miller's part to park the prostitute at defendant's place, for Bowman's and Miller's convenience, until Miller's return to Sitka to set up her own house of prostitution. It supports defendant's motion to strike Miller's testimony (Tr. 99) on the ground that there was no relation of principal and agent, or accessory, shown—no conspiracy or agreement between Miller and defendant shown—wherefore Miller's acts and declarations not done or said in the presence of defendant were not admissible in evidence against

the defendant; and that the testimony wholly failed to show that defendant transported, or aided or assisted in transporting, or in furnishing transportation or the means of obtaining transportation for the prostitute Bowman to go from Seattle to Sitka for an immoral purpose.

Miller's testimony IS ALSO CONSISTENT with the kind of testimony to be expected from a conniving, scheming, self-confessed prostitute caught in the toils of the law for violating the White Slave Traffic Act—her hopes and her fears—her motives in minimizing her own guilty acts by implicating defendant, trying to make it appear that Miller was only the agent carrying out the orders of her principal; her hope of benefiting hereslf—of obtaining some advantage for herself; or to gratify her malice because defendant's failure to build a place for Miller resulted in the defeat of Miller's plans to have her own house of prostitution at Sitka—the kind of testimony which experience in the administration of the criminal law has shown to be so corrupt as to render it unworthy of belief without independent corroboration. *State v. Carr*, 42 Pac. 215.

The defendant denied that she had any agreement with Miller to procure women in Seattle for prostitution in Alaska (Tr. 120); denied that she and Miller had a code (Tr. 120, 124); denied that she had any arrangement with Miller to transport, or furnish transporta-

tion or the means of transportation for, the Bowman woman to Alaska (Tr. 122) ; denied that she told Miller to advance money for fares (Tr. 130) ; denied that she had a conversation with Miller about girls (Tr. 124) ; admitted that she did receive the telegram, Plaintiff's Exhibit 1, from Miller, but said she didn't know what it meant, and did not answer it (Tr. 126, 159) ; denied that she gave Miller credit for rent or anything else for money advanced by Miller (Tr. 129) ; admitted that she agreed to build a place at Sitka and lease it to Miller so Miller could have a place of her own (Tr. 138) for a house of prostitution (Tr. 139) ; alleged that Miller was going to furnish the place and get girls for her own place (Tr. 139) ; that she was going to build three extra bed rooms for Miller (Tr. 140) ; that she didn't have the three bed rooms built because the war broke out (Tr. 141) ; and otherwise denied all of Miller's testimony which tended to show that she was in anywise connected with Miller's unlawful enterprise.

In view of Miller's inconsistent testimony, and the defendant's testimony, it seems fairly evident there was a conflict in the testimony as to whether Miller was an accomplice; hence, according to the Oregon Supreme Court in *State v. Carr*, 42 Pac. 215, "the issue might have been submitted to the jury under proper instructions of the court."

However that may be, even assuming, but not conceding, that Miller's testimony so clearly made her an accessory or an accomplice of the defendant that the

question became one of law for the court, and that in consequence Miller's acts and declarations not in the presence of the defendant became admissible in evidence against the defendant under the theory that because they were overt acts and declarations done in furtherance of a prior conspiracy or agreement between Miller and defendant to violate the White Slave Traffic Act, the situation still would be governed by Section 5253, CLA 1933, namely:

> "No conviction can be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances of the commission."

There is no evidence whatever that the defendant directly committed the act constituting the crime. On the contrary the evidence clearly shows that the witness Miller directly committed the acts constituting the crime charged, and that the defendant Maude Anderson was not present when those acts were committed by Miller.

Section 5044, CLA, 1933, provides:

> "That all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such."

Therefore, in view of the evidence and this statute the prosecution must show that the defendant aided or abetted in the commission of the crime charged; and, however convincing the government may urge the testimony of the witness Miller to be to show it, a conviction cannot be sustained on Miller's uncorroborated testimony. *State v. Carr*, 42 Pac. 215, ante.

The government realized the principals of law just stated, and called four witnesses other than Margie Miller in an attempt to adduce the required corroboration of Miller's testimony. They were: Oliver T. Mansfield, an FBI agent (Tr. 68); Elvira Cavender, alias Jackie Lugo, a self-confessed prostitute (Tr. 73); Gloria Virginia Knapp Bowman, alias Jean La Rue, also a self-confessed prostitute and the alleged victim in the crime charged (Tr. 85); and Henry Green, a steamship agent (Tr. 95).

The testimony of these four witnesses is the only testimony which the prosecution adduced other than the testimony of Miller the accomplice in an attempt to connect the defendant with the commission of the crime charged. The defendant contends it is not sufficient to connect her with the commission of the crime charged, —that much of it is not "independent altogether of the evidence of the accomplice"; and the rest of it merely shows the commission of the crime or the circumstances

of its commission, which, according to Section 5352, CLA, 1933, is not sufficient for conviction.

Prior to showing what the testimony of these four witnesses was, it seems pertinent to determine what is the material issue in the case—what must be corroborated—for it is clear from the decisions herein cited that "the corroborative evidence must relate to some portion of the testimony which is material to the issue". *State v. Scott,* 42 Pac. 1, ante.

The one material issue in the case—the gist of the crime charged—is TRANSPORTATION FOR THE IMMORAL PURPOSE.

This court, in the case of *Tedesco v. U. S.*, 118 F. (2d) 737, said:

> "The essential elements of an offense under this section are (1) knowingly transporting in interstate commerce a woman (2) for the purpose of prostitution or debauchery or any other immoral purpose."

In *Caballero v. Hudspeth* (CCA-10) 114 Fed. (2d) 545, the court said:

> "The emphasis is upon transportation . . . that the gist of the offense is transportation is indicated by the pronouncement of the Supreme Court in those cases in which it has considered the Act. In *Hoke v. U. S.*, 227 U. S. 308, 320, 33 Sup.

Ct. 281, 283, the court said 'what the Act condemns is transportation obtained or aided, in transportation induced, in interstate commerce, for the immoral purposes mentioned' ".

In *Mortensen v. U. S.*, 322 U. S. 369, 64 Sup. Ct. 1037, the Supreme Court of the United States said:

> "The statute aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purpose. To constitute a violation of the Act it is essential that the interstate transportation have for its object, or be the means of effecting or facilitating the proscribed activities. An intention that the women or girls shall engage in the conduct outlawed by section 2 must be found to exist before the conclusion of the interstate journey, and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. *Without that neecssary intention and and motivation immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.* The broad language of the statute is conditioned upon the use of interstate transportation for the purpose of, or as a means of effecting or facilitating the commismission of the unlawful act. Whatever their faults, petitioners are entitled to have just and fair treatment under the law, and not to be punished for transporting girls in interstate commerce for a purpose wholly different from any of the purposes condemned by Congress." (Emphasis ours)

Therefore, in order to sustain the conviction of the defendant under the facts deposed to in this case there must be evidence, independent altogether of the tes-

timony of the accomplice Miller, that Margie Miller advanced money for Bowman's transportation from Seattle to Sitka for the immoral purpose charged "FOR MAUDE", in accordance with a prior arrangement "with Maude" so to do. That is the material issue in this case—that she did it "for Maude", as Miller testified. That is the fact that must be corroborated. The corroborating testimony is therefore not relevant or material or sufficient to sustain defendant's conviction, unless it connects, or tends to connect, her with the material issue of unlawful transportation.

Let us examine the testimony of the four witnesses the Government called to supply the necessary corroboration.

Oliver T. Mansfield testified he was a special agent of the FBI; that on August 31, 1944, at Sitka, he accompanied a deputy marshal who arrested the defendant at her home; that at the time of, and incidental to, the arrest a search was made of the premises "in which she lived" (Tr. 69) "for any evidence that might be connected with this particular case"; that the defendant consented to the search; that in a neighboring room to the room in which the arrest was made a telegram was found. This telegram was identified by the witness Miller as the telegram she sent to the defendant from Seattle. It was dated Seattle, Washington, November 29, 1941, and signed "Marg"; and read: (Tr. 70)

"Airmail two dresses today and send coat on North Coast need the three badly".

This telegram was received in evidence presumably on the theory that in some way it corroborated the witness Miller and connected the defendant with the commission of the crime charged.

Miller testified (Tr. 26) that

> "We had a code message I was to use. Coats and dresses instead of girls, and instead of 'I am sending' use the words 'please send me', 'please send me a dress by boat' that meant a girl was coming by boat. If I said 'please send me a dress by plane', that meant a girl was coming by plane; so she would know when to expect the girl."

If this telegram corroborates anything, it corroborates the defendant's defense, and the theory hereinbefore expressed, that Miller procured girls in Seattle for herself and for her own house of prostitution at Sitka, and that Miller procured Bowman and furnished her money for transportation to Sitka for Miller's own house of prostitution; and that it was not done "for Maude", as Miller testified (Tr. 25, 29).

Miller did not testify, nor did the government ask her, what Miller meant by the last four words in the telegram: "need the three badly." If, as she testified, the words "coats and dresses" meant "girls" and the

words "boat" and "plane" referred to the way the girls were "coming" to Sitka, what inference could be drawn from the four words "need the three badly" other than that Miller herself needed "the three (girls) badly?" Certainly no inference can be drawn from the words that defendant needed "the three (girls) badly." In fact the phrase contradicts such an interference. Her own construction of its meaning contradicts her own testimony that the other two girls got kicked, not off the plane, but "off the boat." (Tr. 49.)

Furthermore, one glance at this telegram shows that it is neither competent nor sufficient to connect the defendant Maude Anderson with the commission of the crime charged. It is only the testimony of the accomplice Miller corroborating herself with a telegram signed and sent by herself. The authorities heretofore cited clearly hold that the corroborating evidence cannot come from the accomplice; but must be some fact "deposed to independently altogether of the evidence of the accomplice."

State v. Reynolds, 86 P. (2d) 413, 418.
State v. Scott, 42 Pac. 1.
22 CJS 1391, 1397, Sections 812, 810.
16 CJS 698, 701, sections 1426, 1434.

Nevertheless in overruling defendent's motion (Tr. 99-102) to strike Miller' testimony and in overruling defendant's motion (Tr. 186) for a dircted verdict, the trial court laid great stress (Tr. 102, 190) on this so called code telegram, Plaintiff's Exhibit 1 (Tr. 70); and it was one of the principal evidentiary facts

which the court held constituted corroboration, and the jury, upon retiring to consider their verdict, took it with them. (Tr. 208).

Elvira Cavender, alias Jackie Lugo, testified (Tr. 73) that she worked as a prostitute at defendant's house from April 16, 1941, to March, 1942, (Tr. 73, 74); that she knew Margie Miller there (Tr. 75); that Margie Miller went outside in 1941 towards Thanksgiving (Tr. 75); that one day she (Lugo) went into defendant's private bedroom, "was only in there for a matter of not more than two minutes"; that Maude Anderson, Margie Miller and the witness were present (Tr. 76).

> "I happened to go in for a few minutes so I would be able to make change. Maude was telling Margie how she would send the telegram or letter, whichever she was supposed to do. It was supposed to be sent in the form of a code. It was clothing, some kind of clothing. I don't remember —coats or dresses. By the code it was in the form of clothing, and Margie was to send Maude in the form of a telegram—it meant girls to bring up to Sitka." (Tr. 76).

Objection was made here and Cavender qualified her testimony as follows (Tr. 76, 77, 78):

> "Q. Do you know what was meant when they were talking about the Code?
>
> "A. Yes.

"Q. What did they say?

"A. It was girls. I heard the word 'girls' mentioned. I heard it.

"Q. Do you recall anything else that was said there or what the discussion was at the time?

"A. No. Just about the exchange of what the telegram was supposed to be about clothes and the girls.

"Q. Was anything said about when it would be sent?

"A. I didn't hear the time when it should be sent. No, I didn't.

"Q. At any time in your hearing, at this particular time and place did Maude ask Margie to procure any girls for her?

"A. To me it looked that way."

The Court: "Never mind that — just state what was said.

"Q. Did she say anyting about Margie getting her girls in Seattle that you overheard?

"A. Well, I didn't hear where she would get girls, but I heard that she would get girls and let her know through the wire in the form of clothes."

Cavender (Lugo) further testified: That the girl Jean LaRue (Bowman) arrived at Maude's house around Thanksgiving, after Margie Miller had gone South (Tr. 78); that she (LaRue) "went and had her

examination, which is the general rule of those houses, and come right back to work"; that she worked as a prostitute in defendant's house and stayed there not longer than two months (Tr. 78).

On cross examination Cavender testified: "I heard the conversation and went right out;" that she didn't hear any other talk about Margie getting some girls, between Maude and Margie, except on that occasion, "that is the only time" (Tr. 81); that she didn't see any code written out at that time; that LaRue worked there "in this house, the same house where she (the witness) was working", for about two months, and then left and went to Ruby's house, the same house the witness went to the following March; that she had known Margie Miller "for quite a long time;" that she met her in a house of prostitution in Los Angeles; that she and Margie are pretty close friends, "not too close. I don't correspond with her regularly as I did with her sister, because her sister was taking care of my child."

Cavender also testified (Tr. 84) that she knew at the time that Miller left for the States, after Thanksgiving, 1941, that Miller intended upon her return to establish her own house of prostitution in Sitka, "I believe that Maude was supposed to let her have a house."

Examination of this testimony shows that Cavender overheard part of a conversation between the ac-

complice Miller and the defendant. We can only speculate and guess what the whole conversation was; and we can only speculate and guess from what Cavender heard and related that they were talking about Miller procuring girls "for Maude." The only point in the whole situation is: Did it circumstantially or inferentially have some tendency to connect the defendant with aiding or abetting the accomplice Miller in the commission of the crime charged, namely, the crime of "knowingly transporting and causing to be transported, and aiding and assisting in obtaining transportation for and in transporting" the Bowman girl in interstate commerce, for the purpose of prostitution and for immoral purposes.

Analysis of Cavender's testimony, upon which the prosecution must rely to corroborate Miller's testimony that she was to procure girls at Seattle "for Maude," shows only that Cavender heard the word "girls" mentioned. In answer to the question: "Do you recall anything else that was said there or what the discussion was at the time?" Cavender answered: "No. Just about the exchange of what the telegram was supposed to be about clothes and the girls." (Tr. 77). In answer to the direct question: "At any time in your hearing, at this particular time and place, did Maude ask Margie to procure any girls for her?" she answered "*to me it looked that way.*" (Tr. 77). In answer to the question: "Did she say anything about Margie getting her girls in Seattle that you overheard?" Cavender answered:

"Well, I didn't hear where she would get the girls, but I heard that she would get the girls and let her know through the wires in the form of clothes." (Tr. 77, 78).

The defendant contends that Cavender's testimony wholly fails to show any agreement between the defendant and the accomplice Miller for Miller to procure girls "for Maude" (the defendant); or any fact from which the inference can be drawn that Miller was to procure girls "for Maude." And that it wholly fails to corroborate the accomplice Miller's testimony that she procured the girls "for Maude."

Even more pointedly, it wholly fails to corroborate the accomplice's testimony as to the essential element of transportation involved in the crime charged. The defendant was not charged with procuring, or aiding or assisting in procuring, girls; and Cavender's whole testimony is not material or relevant (except the small part of it referring to the fact that the Bowman girl arrived at Sitka and there practiced prostitution—an element, but not the material, or essential, element of the crime charged), because it does not corroborate, or tend to corroborate, circumstantially or otherwise, the essential, or material, element of TRANSPORTATION for the immoral purpose charged.

> "The corroborative evidence must relate to some fact or circumstance which is MATERIAL to the issue of the guilt or innocence of the accused;

or, as it has otherwise been expressed, the corroboration must be by proof of substantial facts tending to incriminate the defendant." (Emphasis ours)

16 Corpus Juris, Page 704.

"The rule is that the corroborative evidence must relate to some portion of the testimony which is MATERIAL TO THE ISSUE." (Emphasis ours

State v. Scott, 42 Pac. 1, ante.

And it wholly fails to corroborate, circumstantially or otherwise, the one essential and material point in the accomplice Miller's testimony which must be corroborated in order to sustain the conviction, namely, *that the money which Miller advanced for transportation was advanced "for Maude."*

The testimony is consistent with the defendant's defense, and the theory hereinbefore expressed, that Miller was to procure girls for herself, and not for Maude; and that Miller and Maude were talking about Miller procuring girls for herself, for her own house of prostitution.

Cavender's testimony: "It (the telegram) MEANT girls to bring up to Sitka" * * * telegram or letter whichever she was SUPPOSED to do;" * * * "to me IT LOOKED THAT WAY," represent only the "impressions" of Cavender—how it "looked" to her. But the "impressions" of the witness, or how "it looked" to the witness, is not a

> "fact deposed to, independently altogether of the evidence of the accomplice, which taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it."

State v. Scott, 42 Pac. 1, ante.

We have only this "impression" of Cavender that to her it "looked" as if they were talking about Miller procuring girls for Maude. We have only her "impression" as to the whole conversation which she overheard. Her "impressions" should be viewed with suspicion and distrust in the light of her testimony that she was a prostitute; that she met Margie Miller in a house of prostitution in Los Angeles; that she had known Miller "for quite a long time;" that she and Miller "are pretty close friends;" and that Miller's sister was taking care of the witness' child, because her "impressions" would naturally be inclined to favor and agree with her friend Miller.

Defendant contends that Cavender's testimony is incompetent and immaterial, and has no evidentiary value whatever, either to connect the defendant with the commission of the crime charged, or to corroborate the accomplice Miller's testimony that she (Miller) furnished the money for transportation "for Maude."

The point of what the prosecution was trying to prove, or corroborate, by such testimony comes and

goes in the mind as the testimony is analyzed; and leaves the "impression" of fleeting shadows that come and go upon the waters. It wholly fails to meet the rule laid down by the Oregon Court in the case of *State vs. Scott*, 42 Pac. 1:

> "that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove immaterial matters, which were known to everybody, would have no tendency to conform his testimony involving the guilt of the party on trial . . . . There should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it."

The testimony of Gloria Virgina Knapp Bowman (alias Jean LaRue), the third witness called by the prosecution, does not show a pretty story. Even though everything Bowman did was done knowingly and voluntarily, it damns Margie Miller and the other procurer in Seattle who assisted her in procuring Bowman for the purpose of prostitution. It damns Margie Miller for furnishing her the means of transportation from Seattle to Sitka for the purpose of prostitution. And it damns the defendant for running a house of prostitution at Sitka, and for permitting Bowman to stay there and practice prostitution.

But, the defendant was not charged with running a house of prostitution, or with allowing Bowman to

practice prostitution in her house. The specific charge was that the defendant did

> "knowingly transport and cause to be transported, and aid and assist in obtaining transportation for and in transporting"

Bowman from Seattle to Sitka, in interstate commerce, for the purpose of prostitution and for immoral purposes.

Margie Miller's testimony was that the defendant asked her to get some girls in Seattle for defendant's house of prostitution at Sitka; that if they didn't have the fare to advance it; that in accordance with prior arrangements so made with Maude Anderson she (Miller) procured Bowman, and advanced her the fare for transportation to Sitka; and that the girl was transported from Seattle to Sitka for such purpose.

Now, we believe the matter material to the issue in this case—the matter that must be corroborated by independent evidence in order to connect the defendant with the commission of the crime charged — is that Maude Anderson, prior to the commission of the crime, agreed with or requested the accomplice Miller to procure, on behalf of defendant, girls in Seattle for purposes of prostitution at Sitka, and to advance the fare to Sitka if they didn't have the fare; and that in furtherance thereof Miller procured Bowman to go from Seattle to Sitka for such purpose, and advanced her fare

for transportation to Sitka for such purpose, and that the girl was transported from Seattle to Sitka for such purpose. In other words, that Miller did these things "for Maud (defendant)" in accordance with a prior arrangement made with defendant so to do.

When the matter material to the issue is clearly so defined and limited it is at once apparent that evidence showing that the girl was furnished money by Miller for transportation to Sitka for purposes of prostitution, that she was transported to Sitka for purposes of prostitution, and that at Sitka she practiced prostitution in Maude's house, is not sufficient corroboration; for such evidence merely shows the commission of the crime or the circumstances of the commission. It does not connect, or tend to connect, defendant with the commission of the crime—it does not show that Miller did these things "for Maude," by prior arrangement made with Maude (defendant).

Also when the matter material to the issue is clearly defined and limited, it is at once apparent that all of Bowman's testimony concerning what Miller said and did in Seattle, not being in the presence of the defendant Maude Anderson, amount to no more corroboration of the material issue than they would if Miller had directly said to Bowman, and Bowman had testified thereto, that she (Miller) was not doing these things for herself, but was doing them "for Maude (defendant)." The

reason is, as stated in *State v. Scott*, 42 Pac. 1, that the corroborating evidence cannot come from the accomplice, but must be "some fact deposed to independently altogether of the evidence of the accomplice." Therefore, such testimony as the following given by the witness Bowman, like the telegram heretofore considered, shows that it comes from the accomplice Miller, and is not "independent altogether of the evidence of the accomplice" (Tr. 86):

"Q. What were you going to Sitka for?

"A. To work in a house of prostitution.

"Q. Any particular house?

"A. Yes. Maude Anderson's.

"Q. Upon your arrival in Sitka what did you do?

"A. I went directly to Maude Anderson's." (Tr. 86).

This testimony is not relevant or material to connect the defendant with the commission of the crime charged; because the instructions given to Bowman to go to Sitka to work in Maude's house, and to go to Maude's house, were given by Miller, not in defendant's presence. Such testimony is not independent altogether of the accomplice Miller; and is not competent or relevant to connect the defendant with the material

issue of the crime charged. If this were not so, an accomplice could always corroborate himself by telling his story to an independent witness, and then have that witness testify to what the accomplice said or did. In other words, such testimony tends only to show the "commission of the crime or the circumstances of the commission," which, according to Section 5352, CLA 1933, is not sufficient to corroborate the accomplice.

So defined and limited the matter becomes a question of evidence, independent altogether of the accomplice Miller, of what the defendant said or did, if anything—not what Margie Miller said or did—which tends to connect Maude Anderson with the commission of the crime charged.

We have heretofore pointed out that the evidence shows no actual transportation of Bowman by either Miller or the defendant, either by automobile, boat, or otherwise; that no ticket was actually given or furnished, or other arrangement actually made with a transportation company or carrier, by either Miller or the defendant, to transport Bowman from Seattle to Sitka; and that there was no aiding or assisting in the actual transportation otherwise than by furnishing money to buy a ticket for transpotation from Seattle to Sitka—and that money was personally furnished by Miller to Bowman, who purchased her own ticket and thereby obtained her own transportation.

Examination of Bowman's testimony thus shows that all of it proves, or tends to prove, if anything, no more than the commission of the crime charged. None of it has any tendency to connect the defendant with the commission of the crime; for it is apparent from all the testimony that she knew nothing whatever of any prior arrangement or agreement between Miller and defendant for Miller to procure girls for prostitution at Sitka "for Maude," or to advance money to girls for transportation to Sitka "for Maude" (defendant).

For these reasons, Bowman's testimony, concerning occurrences PRIOR TO THE TIME SHE ARRIV' ED AT SITKA and there stepped across the threshold of defendant's house of prostitution, is not relevant or material or of any value whatever to connect defendant with the commission of the crime charged. The matters within her knowledge, and to which she testified, which occurred AFTER SHE ARRIVED AT SITKA are relevant and material, and of value as evidence against defendant, IF THEY CONNECT, OR TEND TO CON' NECT, Maude Anderson, directly or inferentially, with the commission of the crime charged.

Bowman's testimony concerning matters within her knowledge which occurred AFTER HER AR- RIVAL AT SITKA shows that she arrived at Sitka "the latter part of November — almost December, 1941;" that she went to Maude Anderson's house; that

she didn't see Maude Anderson until about 15 minutes after her arrival at Maude's house (Tr. 92) in Maude's private bedroom; that Maude said :"Are you the girl from the States?" (Tr. 87); that in answer to the question: "Was anything said about whether she was expecting you?" the witness stated her opinion as follows: "She said was I the new girl from the States. That would seem like she was expecting me. I said 'Yes' and she showed me to my room;" that at Maude's direction, the same day Bowman arrived at Sitka, she went to a doctor's for examination, and to the Police Station to report (Tr. 87); that she then went to work —prostitution; that she stayed there "a month. Just a little over maybe;" that she used the name LaRue; that she paid defendant for board and room and "a third of what I made;" that from defendant's she went down to Ruby's house, and from there to the "Middle House"; that she worked at three places in Sitka. In answer to the question (Tr. 89): "Q. At any time did Maude ever mention the money advanced to you for transportation?" she answered ,"Yes", and in answer to the question: "Q. And what was it she said about this money?" she answered "She just wanted me to pay her the money back" (Tr. 89); that she left Sitka February 16 or 17, 1942.

On cross examination Bowman testified that the first time defendant spoke about the $70.00 was when Bowman told her that she was going to move to Ruby's house; that she did not pay the money, or any part of it,

to defendant; that she did pay Margie Miller back "most of it" while Bowman was working at the "Middle House" (Tr. 92); that Bowman made this refund to Margie Miller "in a matter of a few days" after Margie got back to Sitka from Seattle; that she still owes Margie Miller "part of the money" (Tr. 93) advanced to her by Miller; that nothing whatever that defendant might have said induced her to become a prostitute. (Tr. 94).

Such, substantially, is her testimony concerning matters within her knowledge which occurred after her arrival at Sitka. There is not a scintilla of evidence in it to connect the defendant, directly or inferentially, with the commission of the crime charged; that is to say, there is nothing in it to show that the defendant did,

> "knowingly transport, or cause to be transported, or aid or assist in obtaining transportation for or in transporting"

Bowman from Seattle to Sitka, in interstate commerce, for the purpose of prostitution; or to corroborate the witness Miller on the material issue of transportation involved in the case.

It merely shows that, by procurement of Margie Miller, with money advanced for transportation by Margie Miller, Bowman voluntarily went from Seattle

to Sitka, and voluntarily practiced prostitution in defendant's house at Sitka. Her testimony does not show that defendant had anything to do, or was in any wise connected, with her transportation to Sitka for such purpose. The only part of her testimony that might even remotely refer to transportation is her statement that just before she left defendant's house to go to Ruby's house defendant "just wanted me to pay her the money back." But she, in fact, testified that she did not pay it back to defendant; but did pay "part of it" back to Margie Miller after Margie got back to Sitka; and that she still owes "part of it" to Margie (Tr. 93). This seems clearly to infer—at least that seems to have been Bowman's understanding — that she owed the money to Margie Miller, and not to defendant; and it is just as logical to infer that defendant, who said or did nothing to insist on payment of the money to her, also recognized the obligation as one owing from Bowman to Margie Miller and was trying to do Miller a favor in her absence, as it is to infer that defendant was trying to collect it for herself. Bowman's payment to Miller, not to defendant, clearly indicates that the obligation was for Bowman to pay Miller, not defendant; and not an obligation for defendant to repay money advanced to Bowman by Miller "for Maude."

Nevertheless, the trial court in denying defendant's motions for a verdict of acquittal (Tr. 103, 190) held that the telegram, plaintiff's Exhibit 1, and the testimony of the witness Bowman were sufficient to

connect the defendant with the commission of the crime charged. The Court said (Tr. 103): "The evidence of this last witness" (Bowman) "alone is enough to take the case to the jury."

The testimony of Henry Green, the fourth and last witness called by the prosecution, merely shows (Tr. 95) that according to the records of his steamship company, "Miss Jean LaRue" was a passenger for Sitka on the SS North Coast, voyage 68, arriving Juneau 12/3/41. It only tends to show, if anything, the commission of the crime charged; and does not in any way even remotely connect, or tend to connect, the defendant with the commission of the crime charged; and does not in any way corroborate, or tend to corroborate, the witness Miller on the material issue of transportation involved in the case.

It follows that the trial Court erred in denying Defendant's motions for directed verdict (Tr. 186-191), for acquittal (Tr. 5), for judgment notwithstanding the verdict (Tr. 6) and for a new trial (Tr. 7) and in receiving and filing the verdict (Tr. 5) and in entering its judgment (Tr. 10), because:

1. There is no evidence whatever in the case, other than that given by the accomplice Margie Miller, that the crime charged was committed by the defendant Maude Anderson;

2. That there was not sufficient evidence to connect the defendant with aiding or abetting

Margie Miller in the commission of the crime charged; and

3. That there was not sufficient evidence of the material issue of transportation involved in the case to corroborate the testimony of the accomplice Margie Miller.

We extended this brief to the foregoing length in the belief that fairness demanded a full analysis of all the evidence to show no necessary corroboration existed therein.

CONCLUSION

Because of these numerous errors, each of which we urge was of sufficient gravity that its commission denied defendant a fair trial, we submit that a reversal should be granted of the Judgment herein adjudging defendant of having violated the White Slave Traffic Act, namely:

"Same; transportation of woman or girl for immoral purposes, or procuring ticket. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain,

or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910 c. 395, No. 2, 36 Stat. 825.)"

Title 18, U.S.C.A. 398.

Respectfully,

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H. D. STABLER,

M. E. MONAGLE,

Attorneys for Defendant
(Appellant.)

APPENDIX NO. 1

On pages 8 and 17 of this brief reference is made to the prevailing "Taku Wind". We explain what those words mean because apparently no dictionary definition of "Taku Wind" exists. It undoubtedly is comparable to winds which in some places are called "Williwaws". The Juneau station of the U.S. Weather Bureau describes it substantially as a Northeast wind, with quite a little intensity, quite gusty, ranging from 30 to 50 miles an hour, rather cold.

Seemingly near sea level, it apparently blows in all directions at one time, although originating out of the Northeast.

APPENDIX NO. 2

In addition to her requested instruction No. ..... (Tr. 192) which is the basis of her Assignment XXI (Tr. 261, 262) and her requested instruction No. 5 (Tr. 193) which is the basis of her Assignment XXII (Tr. 262, 263) and her requested instruction No. 6 (Tr. 164) which is the basis of her Assignment XXIII (Tr. 263, 264) defendant requested only the following instructions:

INSTRUCTION NO. 1

If you find from the evidence that the defendant, Maude Anderson, had no knowledge of the transportation of the witness Gloria Virginia Knapp Bowman, alias Jean LaRue, or any intent that she was being, or would be transported for the purpose alleged, it will be your duty to find for the defendant and your verdict should be "not guilty".

Pine v. U. S., 135 F. (2d) 353.

INSTRUCTION NO. 2

You should acquit the defendant if you do not find her guilty of the charge made in the indictment, even if you find from the evidence that she has been guilty of wrong-doing or of other offenses not charged in the indictment.

Pine v. U. S., 135 F. (2d) 353.

INSTRUCTION NO. 3

I hereby further instruct you that defendant's intent is a necessary element of the crime with which she is charged, and unless you find beyond a reasonable doubt, from all of the evidence adduced at the trial, that defendant had an intent to commit said crime you should find her not guilty.

Grayson v. U. S., (CAA Ark, 1939) 107 F. (2d) 367.

INSTRUCTION NO. 4

I hereby further instruct you that the testimony of a confessed or proven prostitute is not such as can be relied on to the extent of people with a good reputation and high character.

Sandquist v. U. S. (CCA Utah, 1940) 115 F. (2d) 510.

APPENDIX NO. 3

At the bottom of her requested instruction No. 5, defendant cited the authority namely:

22 CJ 376.

At the bottom of her requested instruction No. 6, defendant cited the authorities, namely:

Freed v. U. S., 266 F. 1012,
Maxey v. U. S., 30 App. D. C. 63,
Thompson vs. U. S., 30 App. D. C. 352, 12 Ann. C.A.S. 1004,

Section 5352, CLA 1933.
Section 4263, CLA 1933.